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NORMS AND CRIMINAL LAW, AND THE NORMS OF CRIMINAL LAW SCHOLARSHIP

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I. INTRODUCTION

A. THE ALLURE OF SOCIAL NORMS

The last decade has seen the emergence of what is now commonly called the study of law and social norms.[1] This cluster of legal commentary has been unusually confident in purporting to offer a fresh perspective on the relationship between law and social behavior. Most broadly put, this school addresses informal social and moral standards and rules which regulate the group and individual behavior to which law attends, and which do so as pervasively as, or perhaps even more pervasively than, the law itself.[2] In its programmatic work, the norms school argues that a useful strategy for lawmakers is to accommodate, ally with, and exploit these social norms to achieve legal goals more efficaciously.[3] In its analytic mode, this school often seeks to redeem microeconomic approaches to law from excessive abstraction,[4] to draw on corrections to rigid

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[1] The most visible announcements that there was indeed such a distinct "school" dealing with law and social norms came in Jeffrey Rosen, *The Social Police: Following the Law Because You'd Be Too Embarrassed Not To*, NEW YORKER, Oct. 20-27 1997, at 170-81, and Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661 (1998).

[2] *See, e.g.*, ERIC POSNER, LAW AND SOCIAL NORMS (2000); Richard H. McAdams, *The Origin, Development and Regulation of Norms*, 96 MICH. L. REV. 338 (1997).

[3] *See, e.g.*, Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997) [hereinafter Kahan, *Social Influence*]; Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995).

[4] *See, e.g.*, Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537 (1998).

rational choice theory supplied by experimental psychology,[5] to enrich rational choice theory with the deep strategic logic of game theory,[6] and, occasionally, in its focus on the phenomenon of "social meaning," to pay some fealty to cultural anthropology or the Humanities.[7]

This article will largely address one important part of the norms school—its application to criminal law. The norms school has been at its most aggressive, in both explanatory[8] and programmatic ways,[9] in dealing with criminal law. This may be no surprise, since criminal law is the area of social regulation where norms of behavior are most invested with moral judgment and political contention, where the reference to "norms" most strongly suggests that those who do not comply with norms are "deviant." Indeed, in the last few decades of American politics, criminal law has been the most attractive and exploited medium by which lawmakers have purported to offer solutions to cultural disorder or antisocial behavior.[10] For another, criminal law has been a relatively open academic market for the norms school, since the explanatory and programmatic scholarship of economics, critical legal studies, and other fields have attended far more to private law and to other forms of public law than to criminal law.[11] In any event, the law-and-norms school has often turned to criminal law to support some of its basic tenets: that social actors are governed less by formal laws than by patterns of behavior which have accrued normative, if not obligatory force; that norms often govern in a manner indifferent to legal rules, sometimes helping or

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[5] *See* Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1057-58 (2000).

[6] POSNER, *supra* note 2, at 172-75; Jason Scott Johnston, *The Statute of Frauds and Business Norms: A Testable Game-Theoretic Model*, 144 U. PA. L. REV. 1859, 1864-65 (1996); Randal C. Picker, *Simple Games in a Complex World: A Generative Approach to the Adoption of Norms*, 64 U. CHI. L. REV. 1225, 1226-29 (1997).

[7] Lessig, *supra* note 3, at 962-63.

[8] *See, e.g.*, Kahan, *Social Influence*, *supra* note 3, at 352-61; POSNER, *supra* note 2, at 88-111.

[9] *See, e.g.*, Katherine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663 (1999) [hereinafter Baker, *Sex, Rape, and Shame*] ; Dan M. Kahan & Eric Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J. L. & ECON. 365 (1999).

[10] *See generally* STUART SCHEINGOLD, THE POLITICS OF STREET CRIME: CRIMINAL PROCESS AND CULTURAL OBSESSION (1991).

[11] Robert Weisberg, *Criminal Law, Criminology, and the Small World of Legal Scholars*, 63 U. COLO. L. REV. 521, 524 (1992).

impeding the enforcement of rules; that norms are immanent with social meaning which lawmakers would do well to heed, and which they can usefully exploit; and that people are susceptible to the conforming force of charismatic individuals or majoritarian patterns of behavior.

The law-and-norms school has faced heavy criticism for its premises and implementation. Much of that criticism has challenged the norms school for failing to meet the standards of rigor for social science. Other criticism has challenged the norms school for failing to deliver on its promise of a new kind of interpretive method, an adaptation of social science analysis that incorporates a kind of social anthropologist's feel for identifying, and tracing the changes in, cultural values. In this article, I examine those criticisms and conclude that on the whole the problems these critics have uncovered are especially evident in the field of criminal law.

The new law-and-social norms school echoes, in ways both obvious and unacknowledged, parts of the enterprise of the old Legal Realism of the 1930's.[12] One strand of the Realist School, for example, oscillated somewhat nervously between, on the one hand a kind of cultural anthropology, by which both legal institutions and the social behavior which law sought to regulate were patterns of custom and habit, induced by both material and nonmaterial culture and both biological and social inheritance, and, on the other, a more ambitious scientism that sometimes led to formal elaboration and aspirations toward mathematical precision.[13] By contrast, modern

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[12] *See generally* LAURA KALMAN, LEGAL REALISM AT YALE, 1927-60 (1986) (reviewing work of great Yale Realists, including Jerome Frank, Myres McDougal, and Grant Gilmore).

[13] The story of one major, if now-forgotten, Realist, Underhill Moore, is poignantly told by John Henry Schlegel in AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 115-46 (1995). Moore argued that

> the common assumption that propositions of law are exhibited by the state to most people, that responses to them are conditioned in most cases by punishment inflicted by the state and that therefore law is a peculiar class of signs to which is given responses differing in degree from responses to other signs, is erroneous.

Id. at 135 (quoting Underhill Moore & Charles C. Callahan, *Law and Learning Theory: A Study in Legal Control*, 53 Yale L. J. 1, 17 (1920)). For Moore, law could indeed affect behavior, but any change in behavior after a legal regulation is enacted varied in proportion to the ratio observed before the regulation between behavior consistent with and behavior inconsistent with the regulation. Moore believed that great insights could be gained by looking at mundane, if legally arcane, matters like the habits of commercial banks in handling their debtors' checking accounts, or even like the pattern of parking in downtown New Haven. He assumed that there was some meaningful structure to this behavior which law might partly control, or which it might well seek to parallel. Moore set out to acquire

law-and-norms scholars have smoothly, and sometimes too glibly, elided the conflicts among disciplinary methods.

For one thing, instead of struggling in frustration to achieve scientific rigor, the criminal law norms scholarship has occasionally claimed an immunity from formal social science standards. For another, this school has developed an additional set of methods and principles as well—a kind of cultural studies interpretivism—that raises problems parallel to those on the social science side. Though lacking clear grounding in humanistic method, some norms-school scholars implicitly claim an almost vatic ability to discern the temper of the times and the values of political entities (ranging from so-called "communities" all the way up to the nation as a whole). The norms school thus runs the risk of wielding a kind of academic populism that can both authorize programmatic prescriptions and issue broad cultural and even political dicta.

The law-and-norms school finds a deceptively useful level of generalization about social behavior to coordinate our understanding of individual and group conduct. But it does so with little distinct theory other than a few general concepts like conformity and esteem-seeking and a sense of fairness, and some borrowings from behavioral cognitive theory and game theory. As means to understand individual behavior, these concepts add little to conventional psychology but often claim explanatory power beyond the judiciously limited applications proffered by most behaviorists. As means to understand group behavior, these concepts are too disembodied to take account of religion, ethnicity, class, or even the more abstracted notions of social groups treated by sociology. And, I argue, in its loose eclecticism norms analysis is peculiarly incongruent with the realm of criminal law, because the criminals society most, and most rightly fears, exhibit both a pathological indifference to, and a compulsive inability to obey, the social norms that supposedly guide good behavior. As a result, in its quest for ways to engineer social behavior to avoid crime, the norms school may have little utility outside minor areas of crime committed by otherwise socially sensitive individuals. Though it purports to take

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"precise knowledge of the specific effects of law on behavior," believing that "until such knowledge is available, any discussion of the relative desirability of alternative social ends which may be achieved by law is largely day-dreaming and discussion of the 'engineering' methods by which law may be used to achieve those ends is largely futile." *Id.* at 134 (quoting Moore & Callahan, *Learning Theory*, at 206-07). Rather, most responses which are thought of as responses to propositions of law "are responses to the behavior of others." *Id.* at 135.

on larger questions about social behavior, the norms school is gravely limited in its ability to usefully address serious matters of crime and criminal law, and it tends to disrespect the more substantial questions of the social costs and benefits of the conventional criminal punishments which are sure to remain the currency of our criminal justice system.

B. THE UNCERTAIN DISCIPLINARY LOCATION OF SOCIAL NORMS

I will first briefly treat the more general kind of social norm analysis, both to lay out the background for the criminal law work, but also to suggest the capacities, limitations, and risks of the general law-and-norms enterprise. The more self-consciously economics-oriented norms work has been sensibly cautious in claiming grand theoretical or practical implications. Instead, it makes some useful corrections or adjustments to rational choice theory, and respectfully suggests how other disciplines can usefully, if indirectly, enrich understanding of the interaction of law and norms. In fact, it is only when some legal academics who draw on behavioral economics and norms overreach to very large claims of moral theory or psychological interpretation that they lapse into some of the conclusory writing to which norms writing is susceptible.

As new as the norms school is, its critics are already numerous, attacking it for false claims of originality, and lack of analytic rigor in its general pronouncements,[14] or for the unsoundness of its programmatic recommendations in specific legal areas.[15] Perhaps the gist of the criticism has been that the "norms" school has not clearly offered a new Realism at all, but rather a new and vague vocabulary that might at best appear to provide a new synthesis of, or

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[14] Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. REV. 1751, 1763-71 (1999); Mark Tushnet, *Everything Old is New Again: Early Reflections on the "New Chicago School"*, 1998 WIS. L. REV. 579, 586-89 (1998).

[15] *See, e.g.*, Albert W. Alchsuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights—A Response to Professors Meares and Kahan*, 1998 U. CHI. LEG. F. 215 (1998); Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POL'Y, & L. 645 (1997); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880 (1991); Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998) [hereinafter Harcourt, *Reflecting on the Subject*]; Bernard E. Harcourt, *After the "Social Meaning Turn": Implications for Research Design and Methods of Proof in Contemporary Criminal Law Policy Analysis*, 34 L. & SOC'Y REV. 179 (2000) [hereinafter Harcourt, *After the "Social Meaning Turn"*]; James Q. Whitman, *What is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055 (1998).

compromise between, law and economics and the social constructivism once associated with critical legal studies and now with postmodernist approaches to law. Indeed, the more acerbic critics have attacked the norms school for (a) an unwarranted confidence in claiming to have *discovered* the rather obvious fact that social norms influence the behavior it seeks to regulate, and (b) insufficient attention to the traditions and disciplines of the social sciences that have long known about the relation of law and norms in complex ways that the new norms school does not appreciate.[16] One line of criticism for example, chastises the norms school for barely mentioning a half-century tradition of social psychology about norms.[17] Norms, this line of criticism suggests, are, ironically, both more deep-seated and more ephemeral than the law-and- norms writing acknowledge. In this view, the shock-force of random social or political, or economic crises will often overwhelm the effect of norms, leaving many of the law-and-norms claims either false or tautological.[18]

I will conclude that in the area of criminal law, the school of social norms has prematurely claimed to identify a distinct and definable interpretive method or predictive apparatus.[19] It has encountered, and failed to meet, the challenge of refining rational choice and microeconomic analysis of law by coordinating causal analyses of social behavior and law with the interpretive understandings of law supplied by law-and-humanities scholarship. In its applications to criminal law, the law and norms scholarship has

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[16] *E.g.*, Tushnet, *supra* note 14, at 588-89.

[17] Jeffrey J. Rachlinski, *The Limits of Social Norms*, 74 CHI. KENT L. REV. 1537, 1540 (2000).

[18] *Id.* at 1556-67.

[19] For a usefully skeptical look at whether "social norms" describe any coherent concept, see Marcel Kahan, *The Limited Significance of Norms for Corporate Governance*, 149 U. PA. L. REV. 1869 (2001). Marcel Kahan worries that

> any type of rule . . . governing how to conduct oneself, which is regularly followed by at least a relevant subset of actors and which is not a command of a law, is a norm. This set, however, includes [for example,] rules that are followed because they are internalized and rules that are followed because of external (nonlegal) sanctions (with sanctions referring to both a negative sanction—punishment—and a positive one—reward). It includes rules that are enforced by second-party sanctions (that is, sanctions administered by the party who suffers from the rules violation) and rules that are enforced by third-party sanctions (that is, sanctions administered by a person other than the party who suffers from the rules violation). And it includes rules in which enforcement is motivated by self-protection and rules in which enforcement is intended to punish the rule-violator (or reward the rule-abider).

Id. at 1873-74.

oscillated between claiming to refine rational choice theory while staying within the boundaries of social science, and, on the other hand, implicitly and often clumsily appropriating notions of social constructivism and literary sensibility from the humanities. And it has done this while also aiming for short-term political purchase by claiming valence in contemporary policy analysis.

Various phenomena that can be called "social norms" surely influence crime and the criminal law, and criminal law scholarship surely benefits from attending to these phenomena in their various concrete forms—indeed, that is what much of criminology is all about. The study of crime and criminal law offers a tempting entanglement of moral, psychological, and instrumental understandings of behavior and hence a tempting opportunity for interdisciplinary-sounding or dialectical-sounding insights. For similar reasons, it is also the area of law most connected to the world of political and media-sound-bite posturings about social policy, and hence the area where the legal academy might find it most tempting to make itself relevant to popular and political discourse and offer visible and marketable prescriptions.[20]

Other academic critics have criticized the norms scholarship on criminal law for so falling prey to these temptations as to clash with constitutional principles[21] or to produce unsound policy prescriptions.[22] But I will largely downplay those concerns. Instead, I will take a deliberately more parochial academic view, stressing the troublesome implications of law-and-norms commentary for criminal law scholarship itself. The norms school is a symptom of the continuing anxiety of contemporary legal scholarship about its inability to devise a satisfactory alternative to economics or rational choice. In declaring a new disciplinary approach, it has found it possible to speak in a remarkably confident voice, in part because the notion of social norms ties in very easily with short-term cultural, political, and social trends, and so is never short of material on which to purportedly base analysis and prediction, but also in part because repeated appeals to the phenomena of social relations enable it to

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[20] This is most obvious in its recommendations about "shaming" penalties, e.g., Dan M. Kahan, *What do Alternative Sanctions Mean?*, 63 U. Chi. L. Rev. 591 (1996) [hereinafter Kahan, *Alternative Sanctions*] ; and restrictions on individual constitutional rights in light of local desires for order, e.g., Dan M. Kahan & Tracey Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 Geo. L. J. 1153 (1998) [hereinafter Kahan & Meares, *Coming Crisis*]. These recommendations are discussed at length in later sections.

[21] See, e.g., Alschuler & Schulhofer, *supra* note 15, at 226-38;

[22] See, e.g., Tonry, *supra* note 14, at 1763-70 (1999).

claim superiority to the atomistic individualism often attributed to modern law and economics work. Thus, the norms school grants itself a kind of normative halo by claiming a form of communitarianism, and by occasionally borrowing from the vocabulary and intellectual capital of the humanities. But it has done these things with insufficient attention to the philosophical risks of communitarianism and to the interpretive complexity the humanities demands.

As a descriptive matter, the norms school might seem to offer an opportunity for a Geertzian "thick description" of the interplay between social concepts of honor and virtue, on the one hand, and legal rules on the other.[23] At least in the area of criminal law, the norms school has not itself provided that description. Rather, it seems to repeat calls for that kind of research while claiming that the notion of norms somehow empowers or sets criteria for that kind of description.[24] Its failure to actually do the descriptive work might not be fatal if it did indeed motivate or aid scholars as the claim suggests. But its claiming seems weak in light of its indifference to the vast amount of legal scholarship that has always done roughly what the norms school claims should be done.

The norms school's supposedly value-free value lies in identifying a kind of efficiency goal: it urges that lawmakers seek some sort of optimal manipulation of norms if they want to reach certain behavioral goals.[25] But, at best, we know that norm manipulation may affect behavior; we have no idea how it *should* affect behavior. And even if viewed as only a value-neutral tool, norms analysis carries implications of prescription—as some critics have suggested, a kind of authoritarian/expertise model of social engineering. And in any event, in the criminal law area, the norms writers do indeed explicitly prescribe, in two senses: we need a corrective to overly severe sentencing, and it is self-evident that various shaming techniques are less onerous.[26] But its calls for new penalties disrespect huge questions of the moral and political bases for criminal punishment, addressing these, at best, with episodic references to political and moral philosophy.

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[23] CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 24-25 (1983).

[24] *See, e.g.*, Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000) [hereinafter Kahan, *Gentle Nudges*].

[25] *Id.* at 608-09.

[26] *Id.* at 640-45.

The deceptive intellectual attraction of norms can create a sense of an especially creative and resilient interdisciplinary perspective. Indeed, as I will argue, the almost seductive fertility of the very word "norms" has led to a morphing of the term and concept into more complex matters of "value" and "belief" that the behavioral apparatus of the norms school cannot fully comprehend. As a result, I also hope to demonstrate, in the volatile context of crime and criminal laws the norms school seems impelled by its own self-conception to attempt unfortunately bold forays into areas like political theory and cultural studies, where the tempting amorphousness of the notion of a social norm has had unfortunate consequences for criminal law scholarship.

II. THE LAW-AND-NORMS SCHOOL

A. AN INTRODUCTORY MAP

In one sense, the norms school is a response or corrective to standard microeconomic or rational choice approaches to law: Under the rational choice approach, law creates rewards and penalties that alter, for better or worse, the willingness of individual actors to act on their preferences, preferences which are exogenous to legal rules and which, to ensure the "parsimony" of the model, must go unexplained. Recently, economists have qualified and adapted their notions of both the utility sought by individual actors—it can certainly include all manner of nonmaterial goods—and the rational methods they employ in achieving them. These economists have done so by reflecting some of the lessons about "bounded rationality" supplied by experimental behaviorism, lessons about the cognitive errors made so often by supposedly rational individuals as to suggest they may be hard-wired into our rational capacities.[27]

1. Key Terms and Principles of the Norms School

The norms school might be seen as an outgrowth of these adaptations in rational choice economics, though it has just barely acknowledged the linkage. It first notes that the rules or standards to be obeyed come not just from positive law, but also from social

[27] *See, e.g.*, Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 45-50 (2000).

customs or consensus social ethics.[28] It suggests that even, or especially, under a rational choice approach, the transaction-costs savings of relying on norms to solve collective actions are so huge that no society can sustain its positive legal order without them.[29] So far, that argument is venerable, dating back at least as far as early 20th-century Legal Realism and Llewellynist commercial jurisprudence.[30] But in perhaps the most enduring work of the norms school, Robert Ellickson's *Order Without Law*,[31] the premise is given very rich and convincing demonstration through a very detailed sociological analysis of a particular local market.

Next, the norms school tries to examine how norms affect behavior, and at this point it invokes a phenomenon called "social meaning."[32] This is the most elusive and troublesome term in this new enterprise. Unfortunately, as Edward Rubin has forcefully shown, the law-and-norms school has essentially ignored the key modern source for the notion of "social meaning" as an engine of individual and group behavior—the work of Edmund Husserl and the school of phenomenology.[33] For now let us say that the norms school uses this term to suggest a few things: first, that when lawmakers make law, they do not just aim to directly control behavior through measurable, if not material, rewards and punishments: they also hope to express certain social or cultural values they attach to that behavior. Hence, we have the "expressivist" component of the norms school.[34] Next, that norms themselves can be seen as non-legal standards which express value as well as offer rewards or punishments; next, that laws work more efficiently when they appropriate meaning from social norms—that is to align their

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[28] DONALD R. KELLEY, THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION 106 (1990).

[29] *See, e.g.*, POSNER, *supra* note 2, at 11-13.

[30] *See, e.g.*, Karl N. Llewellyn, *"What Price Contract?—An Essay in Perspective,"* 40 YALE L.J. 704 (1931).

[31] ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

[32] *See, e.g.*, Lessig, *supra* note 3, at 962-63.

[33] Edward L. Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, but Throw Out that Baby*, 87 CORNELL L. REV. 309, 328-40 (2002). Rubin usefully summarizes how Husserl studied the phenomena of human consciousness in acts of cognition, valuation, and aesthetic appreciation, granting them significance despite any lack of scientific or cultural grounding.

[34] Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 596-97 (1998); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024-26, 2045 (1996).

expressive and measurable effects with consensus social interpretations of the moral value of certain actions.

Social meaning is in turn aligned with two other concepts—social organization[35] and social influence.[36] These concepts could be quite independent, but the norms school links them because it views the main valence of norms as enhancing social organization or as reinforcing social organization. Moreover, the norms school finds a significant cause of most individual behavior not in individual motivation but rather in the contagion effects of others' behavior, often a contagion whose power comes from its ability to transfer meaning as a signal of the value of the behavior.[37] Finally, in norms scholarship "social meaning" sometimes seems to indicate simply some specific non-material commodity that can enter the calculus of rewards and punishments—most often social esteem or honor.[38]

2. The Problem of Internalization

A key question about this norms approach is whether norms are fully "internalized." Roughly speaking, a person "internalizes" a norm if she so values obedience to it that she will invest in obeying the norm for its own sake, independent of any consequential advantages or disadvantages of the obedience; the person has a "taste" for obeying the norm—she has made it part of her moral or philosophical beliefs or intrinsic preferences.[39] Sociologists note that norms vary in the degree to which they are internalized, and that fully internalized norms operate more efficiently.[40] But the general issue of internalization has posed a special temptation and peril for the norms school. The persistent claim to have understood the meaning of social behavior suggests a belief both that norms get internalized and

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[35] Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 194-98 (1998).

[36] Kahan, *Social Influence*, *supra* note 3, at 350-53.

[37] POSNER, *supra* note 2, 18-22.

[38] Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 355-66 (1997).

[39] Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1583 (2000).

[40] *See* Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 10 (1990). For a recent argument that what others call internalization can be objectively observed as really the effect of a law or norm in increasing or decreasing the certainty with which a person holds to a belief about the consequence of actions or causes, see Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35 (2002).

that the inner thinking of individuals can be understood well enough to be regulated. Critics of norms scholarship who largely operate within the world of law and economics, most notably Robert Scott, challenge whether norms scholarship has any way of understanding internalization or inner thinking and instead insist that only observable behavior can be the basis for policy analysis.[41] But more broadly, the claim to have understood what norms and behavior subjectively mean to individuals is part of the high intellectual self-confidence of some norms writing, especially in criminal law. This claim even involves a half-conscious involvement in post-modernist theory, since the norms school at least occasionally uses the fashionable language of social constructivism associated with post-structuralist literary criticism and French social theory.[42] But a fair treatment of the law-and-norms school requires a look at some of its central works, rooted in constructive dissatisfaction with conventional microeconomic approaches to law.

B. VERSIONS OF NEW NORMS-BASED EXPLANATIONS

Twenty-years ago Ellickson sparked interest in this subject with his famous study of ranchers in Shasta County.[43] He discovered norms of cooperation and civil negotiation among ranchers, norms which obviated need for legal regulation, and which would undermine or nullify contrary legal regulation.[44] Had it never used the language of "social norms," Ellickson's work would still merit fame as superb legal sociology—original research into the social origins and effects of law that needed to make no special theoretical claims. But Ellickson explicitly offers his reading of Shasta county norms as an important corrective or admonition to legal microeconomics—in part as a striking reversal of the Coase theorem.[45] In recent years, scholars have broadened the claims explicit and implicit in Ellickson.

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[41] *See* Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1631-33 (2000).

[42] *See, e.g.*, Lessig, *supra* note 3, at 946-47.

[43] ELLICKSON, *supra* note 31, at 15-120.

[44] For example, Shasta ranchers developed informal but simple and regular formulas for splitting the costs of repairing fences, happily indifferent to the rather complicated common law legal rules for proportioning fence liability. *Id.* at 67-75.

[45] *See generally* Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (were transactions costs zero, parties could achieve efficient allocation of resources regardless of choice of liability rule).

1. Expressive Legal Norms

A useful conventional introduction to the post-Ellickson writing on norms is Cass Sunstein's. Sunstein notes that many types of laws function not just by directly controlling or pricing behavior but also by conveying normative messages, and that support for or opposition to laws can be affected by concern about these messages.[46] Thus, for example, even someone willing to believe that trading emission rights can reduce pollution might object to a law permitting these exchanges because the law thereby conceives the natural environment as a mere commodity and thereby masks the moral implications of pollution. Some might oppose the law even if they were absolutely certain it would drastically reduce the pollution; others might be agnostic on the immediate instrumental effects of the law but worry that the moral legitimation might ultimately increase pollution, or perhaps cause different kinds of environmental degradation or social harm.[47]

Sunstein notes that at the margins, changes in social norms can affect behavior beyond the effect that laws can cause. On the other hand, where norm and law are harmonious in their goals, norms can induce greater compliance with a law than the law's direct sanctions can. Sometimes either the norm provides a tipping point for legal compliance, or vice-versa. Sometimes a private "norm entrepreneur" who is willing to bear the social cost of norm violation may move social beliefs towards a tipping point in norm change.[48] Sunstein cautiously says that "if legal statements produce bad consequences, they should not be enacted even if they seem reasonable or noble."[49] He is also agnostic and cautious about the secondary expressive effects of laws; he notes, for example, that many laws have no effect on norms—laws allowing market exchanges for babysitting or pets have not led to wider social devaluations of parental responsibility or of animals.[50] Thus, the success of norms in solving collective action problems depends on a choice among numerous overlapping norms, often of very different degrees of generality. So for example, we may wish there were a specific norm against littering, but we might happily discover that a disfavoring of littering is subsumed under an

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[46] Sunstein, *supra* note 34, at 2024-26.

[47] *Id.* at 2024, 2045-46.

[48] *Id.* at 2030-31.

[49] *Id.* at 2025.

[50] *Id.* at 2029-30 & n.31.

already established, broader norm about the environment or social cooperation.[51]

Moreover, Sunstein acknowledges an important problem in assessing the internalization of norms.[52] Where people act in conformity with a norm in a way that appears to be so risky as to defy practical reason or self-interest, we must ask whether the person actually absorbed the norm into his set of beliefs or felt compelled to take what he knew to be self-destructive steps out of fear of collateral costs or penalties. This point will be important in treating norms and criminal law, where the merely apparent authenticity of highly contrived behavior or norm-expression proves a problem often overlooked by the norms school.

Many of Sunstein's examples, like the expressions of social meaning embedded in in-kind gifts,[53] seem trivial or tautological—that is, they come close to suggesting that for certain behavior there must be something called a guiding "norm" because the behavior seems to be socially compelled yet economically wasteful. But Sunstein wisely notes how little one can generalize from these examples, because they are so context-sensitive—and so he admonishes against global judgments about how people value things from very specific instances. Sunstein warns that "a reference to social norms will become a conclusory response to any apparently anomalous results."[54]

2. Mechanisms of Social Meaning

Lawrence Lessig has provided perhaps the most cited example of identifying a distinct mechanism by which law and norms notably interact, the old law of dueling.[55] Southern legislatures found it futile to ban dueling, but they realized that by denying public office to duelers they could achieve their goal indirectly by affecting the social meaning of dueling and its association with honorable office.[56] Lessig's explanation of "tying" and "ambiguation" is indeed an all-too-rare effort in this field to suggest a device distinct from conventional market-intervention mechanisms by which lawmakers

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[51] *Id.* at 2032.

[52] *See id.* at 2034.

[53] *Id.* at 2036.

[54] Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 945 (1996).

[55] Lessig, *supra* note 3, at 968-72.

[56] *Id.*

can alter social conduct.[57] Lessig infers that the lawmakers learned how to appreciate and thereby subtly exploit and modify the "social meaning" of dueling.[58]

Some of Lessig's examples may lack wide applicability because their "expressive" content is so patent—for example, fights over the use of the Confederate flag.[59] Other examples detect subtler meanings to explain otherwise irrational norms. Thus, seatbelts may save lives, but to strap oneself in a Budapest taxi cab insults the driver;[60] similarly, motorcycle helmets in the old Soviet Union may have been highly cost-effective, but represented the corrupting influence of capitalism;[61] depending on the culture, tipping (for waiters or cab drivers) can be obligatory, appreciated, unnecessary, or insulting. For Lessig, social meaning results from often invisible or uncontested associational links, but partakes of the "social magic" described in the works of Pierre Bourdieu.[62] But sometimes Lessig leaves us with perhaps *too* magical an understanding, because we might wish for a more specific explanation of the agency of change, and hence must worry that Sunstein's admonition has gone unheeded. Indeed, Lessig's citation to Bourdieu tempts us to inquire about the more detailed mechanics of social meaning's influence on behavior. Bourdieu depicts a subtle and complex mix of conscious and unconscious motivations, of spontaneous reactions, opportunistic adjustments, and highly scripted behavioral rituals.[63] Reference to

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[57] *Id.* at 1009-11, 1031-33.

[58] *Id.* at 971.

[59] *Id.* at 953.

[60] *Id.* at 952.

[61] *Id.* at 964-65.

[62] *Id.* at 959 (quoting PIERRE BOURDIEU, LANGUAGE AND SYMBOLIC POWER 125 (1991)). First, every social interaction has a competitive or strategic dimension. Every interaction takes place within a general contest over cultural authority. Second, the "disciplining" process in modern society does not mechanically form actors but engages their active, avid participation. Third, the display of literacy, aesthetic refinement, and rhetorical skill are all means of staking a claim to "distinction," social status, and symbolic capital. Fourth, the exercise and conservation of power depend upon an aesthetic and dramaturgic activity of playing "characters" to an audience. Finally, the exercise of authority is conditioned on both the social criteria for its exercise and the discretionary application of those criteria by particular social actors. In this sense, conserving authority involves a "negotiation" or "exchange" of "symbolic capital" with norms, institutions and individuals. PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE 171-88 (Richard Nice trans., 1977).

[63] The key to understanding human action for Bourdieu is his concept of the "habitus." The habitus consists of (1) a repertoire of behaviors and gestures developed as a result of either deliberate inculcation, imitation or random processes of trial and error; (2) dispositions to so behave in response to certain situations; (3) the ability to interpret situations as calling

Bourdieu may thus tempt us to wonder what image of the norm-influenced individual is assumed or implied by particular versions of law-and-norms analysis, as compared, for example to the simple model or caricature of *homo economicus*.

Thus, in the Soviet example, Lessig notes that the anti-helmet campaign peaked and then "the interests of the Soviets changed. The government started producing Soviet helmets.... [so it was] no longer stigmatizing to wear helmets; it was only stigmatizing to import helmets."[64] But we may wonder why indeed the Soviet interest changed, and why the norm change itself was then so limited. Similarly, critics have probed the ambiguities of Lessig's dueling example.[65] Why was there no civil disobedience in response to the law? And how did the anti-public service law get passed in the first place? (Lessig even admits the empirical mystery surrounding grandfathering of the law.) Yes, certain forms of behavior take on some independent autonomy—a power over the individual's belief beyond the person's consciousness of its practical consequences for her; and so, as in another Lessig example, Lenin had to co-opt the old pre-Communist forms of religious and patriotic ritual.[66] But the question remains when and how these things happen. Lessig offers the interesting example of the lunch-counter owners in the civil rights era, who, he says, welcomed Title VII because it helpfully "ambiguated" their concession to serving black customers.[67] But how do we distinguish this from a case where the change in the law has no normative significance at all, but simply recalibrates or more subtly targets its deterrent effect? Or might the Title VII example show nothing more than that a background norm of obedience to law happened to trump a particular opposing social norm? Unfortunately, the example never shows that the merchants had their beliefs

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for such behaviors; (4) experience deploying these behaviors with more or less success in unfamiliar situations; (5) experience modifying such behaviors in unfamiliar situations; (6) a repertoire of goals the actor experiences as appropriate and attainable for someone like herself. And while the habitus enables some choice and creative adaptation it is also the repository of past socialization or "discipline." Thus, practical intelligence may be very different from the calculating rationality that economic theory ascribes to actors. Indeed, Bourdieu argues that economic rationality should itself be seen as a habitus: a set of coping skills peculiar to certain social groups and situations. BOURDIEU, OUTLINE OF A THEORY OF PRACTICE, *supra* note 62, at 72-95; *see also* PIERRE BOURDIEU, THE LOGIC OF PRACTICE 66-79 (Richard Nice trans., 1990).

[64] Lessig, *supra* note 3, at 965.

[65] Tushnet, *supra* note 14, at 583-84.

[66] *Id.* at 983.

[67] *Id.* at 965-67.

changed, in part because it does not establish precisely what their beliefs (as opposed to their behavior) were in the first place.

Lessig does venture some analysis of the mechanisms of norm-building and norm change.[68] He reviews, at an (admittedly) high level of generality, such social processes as cultural education, language imposition, and political and civic rituals. He notes that some devices are defensive or negative—designed to obscure or erase rather than to express meaning.[69] His treatment of these devices often reveals interesting social insights, though occasionally perhaps they stretch the notion of "meaning" too far. So, for example, perhaps the military's "don't-ask-don't tell" policy tells us something about meaning manipulation in its defensive form.[70] But to say that anti-miscegenation laws erase the meaning of forced integration by reinforcing the notion of white purity, or that sodomy laws are designed to control the meaning of homosexuality, leaves large questions about the mechanisms of social or legal change.[71]

Ultimately, however, Lessig inclines back to economics because he seeks methodological parsimony in explaining how social meaning operates.[72] Thus, though he mentions the guilt-inducing effects of certain penalties, he avoids overselling the notion of internalization precisely by focusing on the economics of reputation—for him, the cost of violating or challenging a norm is great enough to explain norm compliance.[73] Lessig criticizes Richard Posner solely for taking too fixed a view of preferences and thereby avoiding the "meaning" element, as in the matter of finding the right policy to encourage use of condoms.[74] But consider the possible "meanings" of condom use that Lessig elaborates—that it either interferes with sexual pleasure and signals health worry, or that it is a normal and unintrusive part of sexual relations. These meanings are rooted in changing perceptions of the practical consequences of various actions, and indeed Lessig explicitly refers to "social meaning costs."[75] Lessig thereby implicitly invites the same criticism

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[68] *Id.* at 962.

[69] *Id.* at 986-87.

[70] *Id.* at 987-89.

[71] *Id.* at 990-91.

[72] *Id.* at 992-93.

[73] *Id.* at 995-96.

[74] *Id.* at 1019-25 (critiquing TOMAS J. PHILIPSON & RICHARD A. POSNER, PRIVATE CHOICES AND PUBLIC HEALTH: THE AIDS EPIDEMIC IN AN ECONOMIC PERSPECTIVE (1993)).

[75] *Id.* at 1022.

that Richard Posner—see below—directs at the proponents of behavioral economics, namely that all this notion of meaning is quite subsumable under rational choice theories, and that, for example, relying on tying and ambiguation to change the "meaning" of condom use fits well within the technology described by rational choice theory. [76] Lessig reviews the collective action model, and the concomitant notion of "selective incentives" in norms and law, but he confesses that in searching for norms that guide whether [one or we] should change, we must rely on the relatively mundane economic goals of efficiency and distribution—because there is no other benchmark for the "normativeness" of norms.[77]

3. The Market of Social Esteem

Another approach to identifying the mechanisms by which social meaning gets transmitted is that of Richard McAdams. McAdams takes the tack that the world of norms is about a market in a distinct social currency—social esteem. [78] McAdams acknowledges and draws on Lessig's "social meaning" themes, but avoids many of the risks of the amorphousness of social meaning by more firmly hewing to an economic line.[79] For McAdams, the key to behavioral motivation is *relative* esteem. Desire for this precious commodity—a form of conspicuous consumption—will produce a norm if three conditions obtain: (1) there is a consensus on whether engaging in X enhances or lowers esteem; (2) there is risk or possibility that engaging in X will be detected; and (3) existence of the consensus is well-known. Because, for McAdams, social discussion always occurs and ensures publicity of people's esteem-seeking behavior, mass ignorance is not an equilibrium. But where a consensus exists against a behavior, expression of disapproval is not inevitable, since we face information costs in knowing of others' behavior and guessing whether others will know of ours. These costs may prevent the communication necessary to publicize and produce a norm, or may hide non-compliance with the norm.[80] Therefore, people make

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[76] *See infra* notes 123-57 and accompanying text.

[77] Tushnet, *supra* note 14, at 993-96.

[78] McAdams, *supra* note 38, at 355-56.

[79] He does, however, define social meaning in terms of his disesteem concept, as "the relationship between a specific behavioral norm and the abstract internalized norm it implements." *Id.* at 385-86.

[80] *Id.* at 393-94. McAdams defines shame as the disesteem individual "receives" from those who see her as deviant; guilt, by contrast, is the psychological discomfort suffered by

their own cost-benefit analyses as to whether it is safe or beneficial to make a normative statement by acting contrary to a perceived norm.[81]

McAdams, like other norm-economists, notes that the low cost of expressing approval or disapproval solves collective action problems and makes it possible for norms to arise. In his calculus, a norm arises when, for most individuals in a population, this esteem cost exceeds the cost of following the consensus. McAdams concludes that even a meager concern for esteem can affect behavior, when multiplied by a large number of people whose esteem is contingent on the behavior. Though McAdams believes people value esteem highly, for purposes of this argument even a small value will make a difference. A norm arises when, for most individuals in the population, this esteem cost exceeds the cost of following the consensus. Thus, if most group members prefer bearing the cost of doing X to the esteem cost of failing to do X, most members will do X.[82]

McAdams thereby can offer some useful suggestions about how the mechanisms of norm-change can operate. And while some insist that law can *publicize* norms but not *create* them,[83] McAdams shows how law can indeed provide concrete means for implementing them. For example, McAdams explains how even though an individual cannot gain relative status by conforming, the desire for relative status can cause conformity. People will go out of their way to visibly *not* trade with the deviant, thereby raising the cost for those who persist in either deviating or engaging with the deviant. Thus,

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an internalizing deviant, regardless of whether others think her a deviant. Shame comes before guilt—external sanctions thus produce internalization.

[81] As with Lessig, Bourdieu supplies an interesting analogy here, especially because Bourdieu sees "honor" as very salient in a way similar to "esteem" for McAdams. But if, for Bourdieu, there is a common motivation for social behavior, it is honor rather than greed. Thus, practical action is less reflective, and yet both more ritualistic and more idealistic than rational choice theory would suggest. In some social settings, however, the pursuit of esteem can indeed habituate actors to economic rationality. The actor is always, to some extent, in the position of a judge trying to apply archaic rules to novel circumstances. Practical actors learn to expect variation in the responses of others and the judgments of observers as to which responses are socially acceptable. Nevertheless customary norms can constrain practice, because when one judges another she deploys schemes of perception and appreciation operative in the habitus of other participants in the practice. BOURDIEU, THE LOGIC OF PRACTICE, *supra* note 63, at 63-64.

[82] McAdams, *supra* note 38, at 364.

[83] *See* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997).

both heroic and deviant behavior can have very catalytic effects:[84] every act of compliance by someone raises the cost of noncompliance by anyone else, and of course tipping points and cascades can then occur. These effects can be induced by carefully calibrated legal interventions that can shock and jar the system of norms in a society.[85]

But by McAdams's own analysis, norms can have pernicious effects on people who over-invest in norms when they comply with them. To return to the dueling example, competition for esteem lowers the level of insult for which dueling becomes the remedy—and a collective action problem arises because no one person is willing to declare that the insult level is too low.[86] For a more modern example, McAdams cites the problem of police officers' over-investment in honor codes of silence. These codes were originally designed to protect fellow officers from sanction for minor offenses, but have come to protect egregiously corrupt police who actually harm the fellow officers who protect them.[87] Nevertheless, these interesting examples may still simply be cases of conflicting norms where compliance cost and collective action problems prevent an optimal solution. Hence, they still do not tell us whether norms theory offers any way of measuring or monitoring the tipping point here.

McAdams exhibits the virtues of the more "parsimonious" norm economists. He shows care in clarifying assumptions and stipulations, and finds it unnecessary and unhelpful to commit to any notion of internalization. In terms of expressive function of law, he finds it too simple to say either that people have an internalized need to obey the law or that they feel guilt for violating a law that states a norm they have already internalized. McAdams indeed insists that social norms can exist entirely without internalization.[88] For McAdams, norm changes can result from fairly mundane exchanges of information: people learn that they have over or under-estimated the percentage of people who support a particular norm, and they change their behavior accordingly in order to enhance their social standing. He is willing to posit that people feel "guilt" when they believe they have violated a norm, even if they have not, and

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[84] McAdams, *supra* note 38, at 365.

[85] *Id.* at 399.

[86] *Id.* at 423.

[87] *Id.* at 421-22.

[88] *Id.* at 376-81.

"shame" when they are perceived to have done so, even if they have not; thus, a kind of internalization might result from the discomfort of realizing that one has betrayed a norm that one has learned to respect for purposes of enhancing one's reputation. Yet McAdams need not make any ambitious psychological claims about subjective belief to support his thesis, so long as we can assume that the desire for esteem remains the key motivation.[89]

4. The Example of Blackmail

In his one detailed foray into criminal law, his treatment of blackmail, McAdams finds a level of generality about norms and law, and a level of "parsimony" about quantification of social variables, that offer some reasonable promise of norms-based insight into legal questions.[90] McAdams sees blackmail as posing a more complex dilemma than merely choosing between laws and norms as regulators. Instead, it poses a choice between two law/norm pairs: (a) a legal ban on blackmail working with common informational social norms against excessive disclosure; and (b) legal permission of blackmail, along with social norms controlling excessive secrecy. He suggests that secrecy can be excessive not just because it might obscure serious crimes, but also because it reduces the refinement of social norms that disclosure and discussion of violations can produce. A blackmail ban may raise the cost of norm violation, but it also denies the public the opportunity for that potentially salutary information and discussion; moreover, assuming that norm-violator might achieve some moral improvement if exposed to public scrutiny, the blackmail ban reduces that possibility.

Conversely, if blackmail is permitted, third parties who want disclosure might in theory be willing to outbid the victim and win disclosure from the secret-holder, thereby reducing excessive secrecy. But any "contracting" between the secret-holder and these third parties faces far higher transaction costs than the individual blackmail contract. Ultimately, McAdams concludes in favor of the blackmail ban because he finds the informational norms reducing disclosure to be more successful and beneficial than their opposites. This is partly because he takes a chance on the decency norms that constrain harmful disclosures. But McAdams also notes the greater difficulty of "monitoring" excessive nondisclosure, since by

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[89] *Id.* at 381.

[90] Richard H. McAdams, *Group Norms, Gossip, and Blackmail*, 144 U. PA. L. REV. 2237, 2243-64 (1996).

definition omissions are harder to flush out than commissions. He also factors in the greater transactions costs faced by opportunistic secret-discoverers dealing with third parties as opposed to victims.[91]

McAdams addresses one unresolved dilemma about blackmail. If one argument in favor of the ban is that blackmailing encourages wasteful investments in discovering secrets, he asks whether there is any reason to ban "opportunistic" blackmail—i.e., blackmail on adventitious secret discovery. Pondering legalization for this subset, McAdams concludes that

> the net effect is essentially ambiguous and the literature is, to my mind, inconclusive. Incentives do not provide a compelling argument for legalizing some subset of blackmail, but neither do they create an independent argument for prohibition. The economic case against blackmail is not that we know the incentive effects are bad but that we doubt the effects are good and we do not want substantial resources invested in what is probably a sterile activity.[92]

Ultimately, the example demonstrates that some amount of norm governance is inevitable, if only because certain legal rules will have widespread if unintended effects on norms. Thus, "[i]f the state is to regulate norms intentionally, it should choose an optimal mix of rules either generally favoring or disfavoring norms in combination with rules facilitating or obstructing particular norms."[93] By insulating the information-holder from any monetary influences on his decision whether to withhold or disclose the secret, a blackmail ban maximizes the influence of norms on such decisions. Thus, McAdams concludes, at least within close-knit groups the ban is likely to be efficient, and this turns out to be of pivotal importance in defending an economic explanation of the blackmail ban.

McAdams's treatment of blackmail is generally useful because it demonstrates that on a fairly theoretical question, some reference to social norms, if handled judiciously and with an honest degree of abstraction, can inform and refine what is essentially a rational choice approach to a criminal law question of (largely) conceptual and philosophical interest.[94] But in that sense, as I hope to demonstrate,

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[91] He offers a subtle focus, for example, on the sincerity problem: he notes that the people least inclined to violate norms have the easiest time convincing others of their sincerity in obeying norms, but are also the ones least affected by a ban.

[92] *Id.* at 2269.

[93] *Id.* at 2291.

[94] *See infra* notes 223-28 and accompanying text (discussing usefulness of behavoral psychology in improving rational choice theory).

McAdams's work on blackmail is, unfortunately, more exceptional than typical.

C. GENERAL CRITIQUES OF NORMS

1. The Challenge to Originality

The emergence of a law-and-social norms school has been met rather quickly with a series of critical responses. Perhaps bluntest have been the complaints of this school's indifference to, or disrespect for, established scholarly traditions. So, for example, Mark Tushnet notes in particular its disregard for the legal sociology of the Wisconsin law-and-society school, in which, he asserts, most of its claimed insights can be found. Moreover, Tushnet complains that the norms school has been wholly indifferent to cultural studies scholars who, without any pretense to scientific precision, have enriched legal studies with interpretation of meaning.[95] Tushnet also takes the norms school to task for its failure to recognize the key sociological grounding of norm compliance, that is, the selection of positive and negative reference groups, and the hard work of structural analysis done by such classic sociologists as William Whyte.[96]

In the criminal area in particular, the norms school has been charged with a shaky use of evidence, and with premature extrapolations from sociology, anthropology, and journalism, for impressionistic anecdotalism, and overly bold programmatic conclusions.[97] Toni Massaro has most frontally attacked the law-and-norms approach to criminal law. She notes that "if law *didn't* have some capacity to affect both social meanings and social norms, and to effect some social influence and inflict some emotional harm by denouncing the criminal act and thus conveying disapproval of the offender, it would be pointless from a consequentialist perspective."[98] Does the focus on social norms, she asks, "merely restate what is already widely understood about how fear of social disapproval contributes to norm observation in ways that are obviously relevant to

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[95] Tushnet, *supra* note 14, at 583.

[96] *Id.* at 583 n. 12 (citing WILLIAM FOOTE WHYTE, STREET CORNER SOCIETY: THE SOCIAL STRUCTURE OF AN ITALIAN SLUM (2d ed. 1955)).

[97] Tonry, *supra* note 14, at 1763-71.

[98] TONI M. MASSARO, SHOW (SOME) EMOTIONS, IN THE PASSIONS OF LAW 80, 82 (Susan A. Bandes ed. 1999) [hereinafter MASSARO, SHOW (SOME) EMOTIONS].

criminal law but that are no easier to quantify, to predict accurately, or to control than they were without the specifics of norm theory?"[99]

Another charge has been, paradoxically, that the norms school both overrates and underrates the strength of norms. That is, the norms school has over-invested social norms with independent strength and valence; it fails to recognize how malleable and negotiable norms are,[100] and how often people complying norms are strategically posturing that they have morally absorbed them. Conversely, the norms school underrates norms in the sense of not rooting them in deeper cultural traditions.[101]

Others have lamented the school's insufficient regard for institutional context. Richard Pildes notes that

> substantive rules reflected in social norms are embedded within a larger system of social norms regarding what we might call jurisdiction, legislative process, fair notice, prosecutorial discretion, transition policy, equitable exceptions, and the like. Government incorporation of the substance of social norms into state policies is perhaps not likely to take this procedural-institutional framework into account. . . . If the state cannot replicate the flexibility and subtlety of the procedural-institutional structure within which substantive norms are given content, that should give policy makers pause before rushing to embrace an effort to shape norms through law.[102]

2. The Critique About Internalization

Another line of criticism has to do with the elision the norms school tries to make between inner thought and manifest behavior. As noted earlier, a continuing controversy in norms scholarship has to do with internalization. Is it a meaningful concept? If so, does it occur as a result of legal change? The issue is a serious one because it affects the range of disciplines on which norms scholars draw, and the efficacy of the legal policies it proposes. One scholar, relying on the tools of analytic philosophy of language, has addressed this problem at a highly abstract level. Matthew Adler focuses on the notion of expressive law—and hence on the law-as-social-meaning aspect of the norms school.[103] Adler argues that he has not yet found any convincing proof that expressive law—law as linguistic

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[99] *Id.* at 83.

[100] Tushnet, *supra* note 14, at 586.

[101] *Id.* at 587-89; *see generally* Scott, *supra* note 41, at 1623-30.

[102] Richard H. Pildes, *The Destruction of Social Capital Through Law*, 144 U. PA. L. REV. 2055, 2074 (1996).

[103] Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1374-75 (2000).

meaning—has any identity distinct from instrumentalism (once we define instrumentalism to include the effect of certain actions on the culture's norms or social practices).[104]

For my purposes, though, more salient is the less technical critique along similar thematic lines from Robert Scott. Reviewing recent norms scholarship, Scott worries whether law actually changes belief, or only behavior—whether it conveys or changes meaning or just information about others' views.[105] Analyzing the supply and demand sides of norms, he acknowledges that legal rules, at least in the oft-used examples of littering and smoking rules, can solve cooperation problems by short-cutting information searches about standards for behavior.[106] But he puzzles over whether there is anything distinctly expressive or normative about this phenomenon, or rather simply phenomenon wholly subsumable under the conventional economics of information. This puzzlement, for Scott, helps place the norms school at the center of a wider concern about legal academics' uses and misuses of other disciplines, a theme central to the discussion of norms and criminal law, below.

Scott takes as the premise of law-and-norms scholarship that it describes a way law can be efficacious that is different from conventional instrumentalism, especially as captured by rational choice theory. He views this as a hypothesis not yet proven, and, reviewing the notions of certain law-and-economics scholars to treat preferences as endogenous phenomena in choicemaking, he skeptically refutes effort after effort to prove the hypothesis.[107] For Scott, law can clearly work with norms to inform or to sanction; he is unconvinced that it *transforms* beliefs. Scott concedes that preferences and values are endogenous, and that a postmodernist

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[104] Adler summarizes his complex and sophisticated argument by noting that terms like "expressive" and "social meaning" are dangerously confusing, and create the risk of a "fallacy of equivocation." Adler traces the following series of propositions about expressive law:

> (1) "Social meaning" has intrinsic moral significance (with "social meaning" defined as the state of social norms, forms and practices).
>
> (2) Law is "expressive" (in the sense of changing or reinforcing social meanings, thus defined). Therefore,
>
> (3) The "expressive" properties of law (now defined as law's *linguistic* properties) are intrinsically important.

Id. at 1500. Adler notes that even if the first two propositions are true, the conclusion is false. *Id.*

[105] Scott, *supra* note 41, at 1627-28.

[106] *Id.* at 1617.

[107] *Id.* at 1626-30.

finds this notion delicious, but for the law and economics analyst, it is a "heady" challenge to follow it out.[108]

Consider Scott's deliberately mundane running example: the Smith family normally ignores an informal social norm against taking dogs on a nature trail, because they favor greater freedom for dogs.[109] A law is passed which affirms the no-dog norm. The law is never enforced by the state, but the Smiths, having learned of the law, nevertheless begin to comply. Scott then wonders about several possible explanations of their compliance. (a) Have the Smiths changed their beliefs—have they internalized the norm? (b) Do they fear eventual enforcement of the rule? (c) Do they (as norms scholars often surmise) *infer* from passage of the law that the informal norm is more widely adopted than they had realized.[110]

Further, Scott, wonders, has the law operated instrumentally, if indirectly, just by raising the costs of dog-walking or by "subsidizing" the objections of the neighbors? As for neighbors, if they now begin to shame the people who violate the norm/law, have *they* now internalized the rule? Or have these neighbors now merely been given a new rhetorical script for persuading others to follow a belief they already held? Or are they indifferent to the particulars of dog rules but simply opportunistic in exploiting the availability of the law-backed norm as way of signaling, for their own economic purposes, that they are norm-adherents in a wider sense?[111]

Does the norms approach tell us anything that a slightly more resilient rational choice analysis would not? As a matter of common sense, we may wonder whether the neighbors enforce a norm to avoid the disapproval of others in the "norm community," or have internalized a norm that obliges them to enforce through shaming those norms to which they themselves adhere. And obviously the

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[108] *Id.* at 1605.

[109] *Id.* at 1608-18.

[110] *Id.* at 1609-12, 1618.

[111] *Id.* at 1613-18. For a good example of how psychologists have demonstrated the perilous complexity of internalization of social influences, see Jacquie D. Vorauer & Dale T. Miller, *Failure to Recognize the Effect of Implicit Social influence on the Presentation of Self*, 73 J. PERSONALITY & SOC. PSYCHOL. 281 (1997). Vorauer and Miller first describe the phenomenon of "behavior-matching," that is, the tendency of people to adjust their own behavior even to slight and nonnverbal behavior of others, and determine by experiment that individuals are remarkably unaware that they are making these adjustments, presumably because they are blinded by their confidence in their understanding of their own general behavior patterns and indeed suffer such a wealth of (accurate) self-knowledge that they cannot discern small behavioral changes.

questions become more complicated when we consider the range of norms, at different levels of specificity, that may bear on people's normative choices. Is it something so specific as the no-dog rule itself that is on the neighbors' minds? Their general concern for the environment? Their general respect for legal commands? After posing these questions Scott concludes that in the standard norms analysis, "the relationship among key variables is not adequately specified."[112]

Thus, Scott laments that any norm approach relying on transformation of belief by virtue of social "meaning" is not falsifiable,[113] nor is it a theory or model in any conventional sense. We do not know enough about baselines of context to predict. So, for example, in Lessig's famous dueling story, we do not know enough about underlying causes or sources of the honor norm. Yes, behavior may change after enactment of an unenforced law, but even if the law is never enforced Scott argues, it is the "legalness" of the norm that changes the behavior. Even where law carries no formal sanction, it is always "state action" in a rhetorical sense. Thus, the interaction between law and norms may exhibit much less mutual influence than the norms scholars think. To anticipate the discussion of criminal law below, I note Scott's example of graffiti–removal: public officials regularly erase graffiti defacing public property, and even if they never sanction the offenders, soon thereafter people commit fewer criminal violations in those public spaces. Norms scholars like to cite this as an instance of a non-legalistic, indeed merely aesthetic, change in the public environment that nevertheless induces greater compliance with legal rules. But, wonders Scott, does the removal stimulate people to associate law-abiding with beauty? Does it change the social meaning of order? Or does it simply provide people with useful, indirect information about law enforcement.[114] Thus, extending Scott's critique, we might ask, in response to the graffiti example, whether people believe that a police force that erases graffiti is much less likely to ignore robbery. Or, more indirectly, but still instrumentally, does the graffiti-removal make it aesthetically more attractive for law-abiding people to enter the subway, thereby reducing the opportunities robbers have to attack isolated victims?

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[112] Scott, *supra* note 41, at 1627.

[113] *Id.* at 1635.

[114] *Id.* at 1620, 1628-29.

Scott notes the heroic efforts of some economists to analyze endogenous preferences in this situation. Robert Cooter's notion of "pareto self-improvement" holds that people will strive to obey and appear to obey norms to improve their attractiveness as contractual partners.[115] George Stigler and Gary Becker suggest that people strive to enhance their allegiance to norms in order to augment their "personal capital stock" of experiences and values.[116] But Scott finds these efforts more rhetorical than real. Social science, he argues, cannot solve the philosophical problem of whether people can motivate themselves to change their preferences. The state may supply people with opportunities to signal that they are better cooperators, but that does not mean it stimulates people to improve themselves. For one thing, it is difficult to enhance one's apparent reliability, precisely because contracting parties can only rely on each other's visible behavior.[117] At some point the signaling party runs into another party who has no way of determining whether the signaler is only being "strategically" fair. We lack any reliable way to distinguish virtue from the effort to appear virtuous, given the human skill at adapting their behavior to mimic attractive traits. Moreover, as Jon Elster has noted, there is an inherent circularity here, in that anyone who tries to adopt a lower discount rate (that is, a willingness to sacrifice long-term for short-term advantage) needs a pretty low one to desire to take up such a challenge in the first place.[118]

True, Scott concedes, the state can pass a law to align itself with popular morality. But if the new law wins deeply normative obedience, then the work is being done by the assumed uncontroversial moral sentiment that the state is wise enough to elevate to a civic duty; the work is not done by the new law itself.[119] Moreover, the notion that law can change social meaning and create normative belief stands it considerable tension with the counter-tendency of new law to inspire deep civil disobedience.[120]

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[115] Cooter, *supra* note 34, at 586. This is similar to Eric Posner's notion of signaling that one has a low discount rate, see *infra* notes 327-32 and accompanying text.

[116] George Stigler & Gary Becker, *De Gustibus Non Est Disputandum*, 67 Am. Econ. Rev. 76, 77 (1977).

[117] Scott, *supra* note 41, at 1635.

[118] Jon Elster, *More Than Enough*, 64 U. CHI. L. REV. 749, 754 (1997) (book review).

[119] Scott, *supra* note 41, at 1639.

[120] *Id.* at 1634.

So, Scott concludes, the norms scholars purport to know more about the world than they do. Just as legal scholars tend to particularize economics, the norms scholars tend to generalize the behavioral sciences. Thus, Scott underscores the problem the norms writing raises for the practice of interdisciplinary legal research. It is difficult "to graft the complex and highly individualized process by which values and preferences are created and modified onto a formal analytical framework."[121] Rather, Scott argues, we should deploy rational choice on its own terms and while looking to the social sciences and humanities for a "situation" sense of context as we examine legal rules and policies.[122]

D. THE CAUTIONARY PARALLEL OF BEHAVIORAL ECONOMICS

1. The New Field of Behavioral Economics

Before turning to criminal law, and to close this general review of the law and norms scholarship, consider a new academic sub-field that underscore the challenges faced by the norms school in linking social scientific and interpretive perspectives on social or governmental behavior. Behavioral economics is a field not only parallel to but closely tied to the study of law and norms—though the two projects often seem to avoid acknowledging their relationship. The norms school occasionally mentions the various cognitive "errors" treated by behavioral economics in its adaptation of rational choice. Conversely, in recent writing some adherents of behavioral economics have spoken at least tentatively in terms of broad social norms. They have done so in part as a rhetorical effort to underscore and, arguably, exaggerate their differences with what they view as conventional rational choice economics.[123] A recent debate on just this issue underscores the interdisciplinary dilemma in which these law-and-behavioral economics adherents find themselves, and therefore helps us understand the situational dilemma of the norms school as well.

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[121] *Id.* at 1647.

[122] *Id.*

[123] For introductions to behavioral economics and law, see Russell B. Korobkin & Thomas S. Ulen, *supra* note 5; Daniel Farber, *Toward a New Legal Realism*, 68 U. CHI. L REV. 279 (2001) (reviewing BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein, ed., 2000)); Chris Guthrie, *Prospect Theory, Risk, Preference and the Law*, 97 NW. U. L. REV. 1115 (2003).

A recent article by Christine Jolls, Cass Sunstein, and Richard Thaler (JST) is a virtual manifesto for correcting rational choice theory of law with the suppler and more realistic findings of behavioral economics.[124] JST review the various new theories of non-random alterations or distortions of the simple rational choice assumptions of rationality, will-power, and self-interest. They call for legal scholarship to incorporate the various "bounds" on these phenomena, most notably elaborated in the famous work of Kahneman and Tversky.[125] These bounds include, for example, attribution error[126] and availability heuristics.[127] They conclude from new studies and theories that people are both more spiteful and cooperative than rational choice predicts, and that, even if we assume away all transaction costs, people exhibit cognitive biases which skew property rights allocations far from what rational choice theory would both predict and advocate. Most fundamentally, people regularly invoke a norm of "fairness" which trumps any simple notion of rational optimization.

JST exhibit an ambivalent relationship to economics that reflects equally on the norms school, and indeed they somewhat acknowledge their link to the norms school. They concede, and even defensively insist, that behavioral economics is a form of economics and is quite consistent with mainstream modeling.[128] They do not claim to be chastising economics for failing to detect random exceptions to rational choice predictions; rather they claim to be improving the realism of the assumptions of economics and making sharper predictions by showing that apparent random exceptions may have explicable patterns.[129]

But when it comes to prediction, JST do very little of it, pointing things to "future research." Most of their specific recommendations

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[124] *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998) [hereinafter JST].

[125] Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY 3 (Daniel Kahenman, et al., eds., 1982).

[126] Attribution error refers to the tendency, in explaining an action, for people to over-emphasize dispositional factors about the actor, and under-emphasize situational factors. *See id.* at 4-11. Thus, we will attribute a friend's recent car accident to his poor driving skills rather than to the fact that another car had just swerved in front of him.

[127] Availability heuristics refer to people's tendency to estimate the frequency of some event by judging how easy it is to recall other instances of this type—thus, a person who has recently experienced a car accident will overrate the general probability of such accidents. JST, *supra* note 124, at 1477-78.

[128] *Id.* at 1481-89.

[129] *Id.* at 1481-85.

are quite mundane, drawing on the narrowest conclusions of the behaviorism they rely on. Thus, for example, JST cautiously suggest the potential feasibility of so limiting a jury's information about a defendant's conduct as to force the jury to consider the defendant's behavior solely *ex ante*, so as to correct for hindsight bias,[130] and also suggest that parking tickets should be made publicly visible to convey a more realistic message about their frequency.[131] Yet when it comes to murkier matters like fairness, while JST deny that they are merely using pride or self-conception as gap-filling phrases to explain what rational choice theory cannot, their borrowings from behavioral economic research do little more than restate just those phrases and suggest that they represent factors (not yet quantifiable) to be taken into account in making predictions. They purport to criticize rational choice theory for covering too great a multitude of sins—utility theory, response to incentives, welfare self-improvement, pure ends-means rationality—but if so, they do not explain why those different things cannot remain easily subsumed within economics.

In trying to define fairness, the best JST can do is to seek empirical bases for normative values; hence they try to measure fairness according to what they call "reference benchmarks"—observable averages of customary behavior.[132] When no measurable benchmark is available—on such normative questions as which forms of property can be commodified, for example—they punt the issue over to "community sentiment."[133] They claim to explain legislation by reference to the availability heuristic, but do little more than confirm the intuitive observation that some people will be misled by, and others will willfully exploit, highly salient-seeming anecdotes underlying more complex policy questions. In their foray into crime, they claim to correct the conventional economic approach by suggesting that it understates the degree of discounting that criminals do.[134] Yet, otherwise, JST simply invoke the availability heuristic in suggesting that "community policing" will make law enforcement more visible and effective, though criminal incentive analysis remains subject to reference to the "role of community."[135]

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[130] *Id.* at 1527-29.
[131] *Id.* at 1538.
[132] *Id.* at 1516.
[133] *Id.* at 1541.
[134] *Id.* at 1538-39.
[135] *Id.* at 1538-41.

2. Critiques of Behavioral Economics

I will commit the error of hindsight bias myself now in saying that this ambivalence by JST clearly invited the two responses they received.

At times, in his response to JST, Richard Posner approaches them from one direction and says rational choice theory is capacious enough to accommodate emotion and irreducibly subjective preferences.[136] At times, from the other direction, he happily accepts JST's technical insights and says they are all part of his own toolkit.[137] At times he accepts their claim to be acting consistently with economics and yet at other times he accuses them of crude technical or empirical errors, such as relying on unrepresentative samplings in experiments,[138] and of failing to see that their implied sample for criminals is self-contradictory.[139]

For Posner, behavioral economics does not add to, or correct, rational choice. In Posner's view, to the extent that behavioral economics makes any falsifiable statements, they can be wholly and readily subsumed under rational choice theory. For Posner, behaviorists proffer a straw man version of simplistic rational choice theory, not realizing that this theory can easily accommodate all the boundedness on rationality, willpower, and self-interest to which the behaviorists point. For Posner, many instances of apparent irrationality simply involve altered or idiosyncratic subjective preferences which are rationally pursued. Of course, there is behavior which rational choice theory views as irreducibly irrational, such as voting. But even here, Posner insists, rational choice theory supplies useful and predictive insights about differences in this commitment among various demographic groups.[140] And, insists Posner, where study subjects seem to terminate their thinking well short of discovering available information that would help them achieve what might seem the efficient solution, they are often exhibiting an even greater inefficiency in putting bounds on their search costs. Some behaviorist examples of bounded willpower, Posner insists, can be explained by stipulating that a person may have a multiplicity of self-conscious selves with different preferences and

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[136] Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN L. REV. 1551, 1551-52 (1998).

[137] *Id.* at 1553-58.

[138] *Id.* at 1570.

[139] *Id.* at 1567-68.

[140] *Id.* at 1554-55.

discount rates.[141] Some examples of bounded self-interest, especially those implicated in altruism or falling under the behaviorists' vague notion of "fairness," can and must be understood as predictable residues of the evolutionary biology of kinship,[142] and hence consistent with rational choice theory in a broader sense. Similarly, Posner concludes, the "endowment effect" finds a logical source in earlier stages of society where possession and ownership of all objects were inseparable.[143]

Thus Posner denies that behavioral economics offers any new theory or model of decisional structure. Rather, he sees behavioral economics as, at best, a potpourri of modest peripheral nuances of a properly understood rational choice theory, and, at worst, a messy blurring of neurology, neurosis, and morality in ill-coordination. JST, Posner suggests, half-imply a new image of *homo economicus*, a supposedly rational man stumbling all over himself in error and spontaneously showing spite and altruism,[144] while Posner sees a reasonably rational man exhibiting the quirks and errors that biology and rationality explain and predict. But in absorbing their supposedly counter-Posnerian insights while also drawing on other disciplines, JST end risk ending up where they do, with a strange combination of aggressive commitment to technical, theoretical explanation and prediction, half-guarded hedges on the completeness of their approach, vague invocations of broad normative standards or patterns to fill in gaps in explanation, and promises that further research can fill them.

Thus, both JST and Posner invite the response they get from Mark Kelman, which is that they represent two partners in an intellectual death dance between types of economics that cannot escape their interpretive limits.[145] Rational choice, says Kelman, treats internal subjective preferences as given and inexplicable, but treats the means of fulfilling those preferences as observable actions that are part of a universal toolkit of means. By contrast, for behavioral economists, preferences or supposedly subjective goals are the result of such external forces as context, framing, history, culture, and influence, while the means of fulfilling preferences are

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[141] *Id.* at 1555, 1568.

[142] *Id.* at 1561-62.

[143] *Id.* at 1565.

[144] *Id.* at 1558-59.

[145] Mark Kelman, *Behavioral Economics as Part of a Rhetorical Duet: A Response to Jolls, Sunstein, and Thaler*, 50 STAN. L. REV. 1577, 1579-80 (1998).

messy stories of internal processing deficits and cognitive errors.[146] Kelman concludes that this dance simply shows how economists struggle mightily, but futilely, to escape their own rhetorical assumptions about narrative and framing choices. And he accuses JST in particular of offering an impressionistic set of ad hoc counter-stories but no coherent counter-theory or model.[147] Kelman even rejects Posner's resort to sociobiology to solve certain rational choice dilemmas, arguing that artful use of the framing devices of rational choice works just as well.[148]

Thus, to extend Kelman, behavioral economics illustrates a paradox noted by Amartya Sen. According to Sen, economics inconsistently includes psychological and anti-psychological ideas,[149] and, when economics is called on to embrace other disciplinary perspectives, it exhibits what Shira Lewin calls the "pathological pattern" of clutching psychology to the exclusion of the discipline it finds a more serious threat—sociology.[150] Lewin reviews how early twentieth-century economics shifted neurotically from rejecting all psychology, to accommodating narrow positivist behaviorism, and then quixotically declaring independence from any notions of institutional functionalism or individual motivation or teleology.[151] The new behavioral economics, at least in the form embraced by law, shows little sign of having solved these problems, and, if anything, some of these patterns have plagued the law-and-norms school which mirrors behavioral economics and may be partly inspired by it.

So behavioral economics poses the same dilemma for explanations of social behavior as does the norms school. Has it fundamentally modified, or only slightly complicated, rational choice? Are we left with some balance of assumption of irreducible preferences with various instrumental, and occasionally flawed, means of achieving them? Or have we learned qualitatively different things about how people's normative views and self-conceptions

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[146] *Id.* at 1581-83.

[147] *Id.* at 1586.

[148] Kelman asks, for example, why is price-gouging permissible in real estate but not mercantile markets? Isn't the endowment effect rational, given information costs? And why do we assume that legislators are good at carrying out their own purely self-interested desire for reelection by respecting voters' fairness norms along with raw preferences? *Id.* at 1588 n.31, 1590.

[149] Amartya Sen, *Behavior and the Concept of Preference*, 40 ECONOMICA 241 (1973).

[150] Shira B. Lewin, *Economics and Psychology: Lessons For Our Own Day From the Early Twentieth Century*, 34 J. ECON. LIT. 1293, 1293-1296 (1996).

[151] *Id.* at 1294-95.

determine their behavior? Have we transformed our ability to explain or predict behavior, slightly improved it, or just learned how to be more critical of such efforts?

So behavioral economics is working its way through a disciplinary identity crisis, and the behaviorists who have been speculating about applications of their theories to law have been sensibly cautious in claims they make. They acknowledge the terribly difficult empirical questions raised by their own research for those seeking prescriptive ideas for lawmakers.[152] Moreover, they stress that the very core of behavioral theory is a "situationist perspective" whose benefits are most likely to be sensibly modest reforms at specific points in legal procedures,[153] or very general philosophical pleas for acknowledging the influence of social context in applying objective standards of reasonable conduct.[154] Moreover, as Jeffrey Rachlinski notes, any legal reforms impelled by behavioral psychology are necessarily deeply paternalistic towards individual choice autonomy,[155] and thus require careful cost-benefit analysis—indeed, an analysis that is itself an economic question parallel to that of transaction costs.[156] Finally, legal theory-builders need to be especially cautious in drawing on behavioral science, because, unlike pure rationale choice economics, it is not fundamentally geometric in structure—that is, it offers few broad foundational bases for deriving domain-specific applications.[157]

Law-and-norms scholarship, which partly models itself on behavioral science and energetically draws on its research and theories, ought to recognize that it faces at least as serious an identity crisis and ought to take the behaviorists admonitory lessons as even more applicable to themselves. But as I hope to show, the peculiar temptations of the criminal law have if anything led some in the

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[152] Lee Ross and Donna Shestowsky, *Contemporary Psychology's Challenges to Legal Theory and Practice*, 97 NW. U. L. REV. 1081, 1100 (2003).

[153] *Id.* Common examples are engineering parties' or judges' decision in achieving civil settlements, see Guthrie, *supra* note 123, at 1120-27, or jury instructions or rules of evidence in regard to damage awards, see Jeffrey Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1198-1202 (2003).

[154] *See* Ross & Shestowsky, *supra* note 152, at 1100-01.

[155] Rachlinski, *supra* note 153, at 1165, 1176.

[156] *Id.* at 1219, 1225

[157] Mark Kelman, *Law and Behavioral Science: Conceptual Overviews*, 97 NW. U. L. REV. 1347, 1349-50 (2003). So, for example, that a person is subject to one sort of cognitive bias or "situational mediator" does not establish that he is subject to any other. *Id.* at 1350-51.

norms school to think that they can ignore, or that they have already transcended, these problems.

III. CRIMINAL LAW AND NORMS

A. THE GIST OF THE SOCIAL MEANING AND SOCIAL INFLUENCE APPROACHES TO CRIME

Criminal law, perhaps the richest field for studying and trying to regulate the relationship of behavior and meaning, is a very ripe target for law-and-norms scholarship. It is also the field where the state's supposed monopoly of force may give it special power to induce "normative change" and yet makes it harder to distinguish subjective change in belief from response to sanction. Criminal law also carries with it a sense of social urgency, so that the norms school has found a fertile field for publicity in involving itself in anti-crime initiatives and the volatile facts and perceptions about crime rates in the United States. Also, because of this supposed sense of urgency, criminal law has been the motivation for new, explicit, arguments by the norms school that conventional standards of social science proof must be relaxed.

1. Social Meaning, Influence, and Deterrence

The most visible early paper in this field was Dan M. Kahan's *Social Influence, Social Meaning, and Deterrence.*[158] In summary, Kahan has two key targets: standard microeconomic notions of deterrence and criminal motivation, and standard Warren Court-style constitutional constraints on police. Kahan argues that the economics approach exaggerates the role of direct material or physical sanctions on behavior, failing to appreciate that law also serves to express and enhance social norms and affect processes of social influence and conformity that are deeper motivations for behavior. This might seem an uncontroversial point. But perhaps Kahan recognizes that, while everyone accepts that non-formal and non-legal forces are the dominant factors in behavior, lawmakers and scholars tend to forget or greatly underestimate this phenomenon or fail to appreciate how subtly it can be assessed and guided.

In any event, Kahan draws several rough legal conclusions. First, we must rethink criminal penalties, recognizing that the normative power of certain types of laws and sanctions may render

[158] Kahan, *Social Influence*, *supra* note 3.

them much more efficient than conventional laws and punishments. In this regard, he advocates most strongly two chief legal strategies. First, he calls for the types of police actions lumped under phrases such as "broken windows policing"[159] and "community policing"[160]—in other words, modern order-restoring police techniques. These techniques, he argues, have centrifugal meaning-making and morality-enforcing effects which strengthen communities and reduce crime. Second, because he thinks the most powerful anti-crime good the law can offer is moral condemnation, he thinks the state can optimize punishment by reducing costly material punishments in favor of more straightforwardly condemnatory non-material ones—most obviously, varieties of "shaming penalties." Then, to the extent that conventional constitutional restraints would resist these changes, he argues that constitutional rules be re-read according to a sort of moral consensus or majoritarian-norm test, so that his proposals can be more readily implemented.

Kahan calls this set of conclusions the "social influence conception of deterrence" and credits it with great explanatory power.[161] He offers economics-style graphs for illustration, though the graphs seem to simply restate the point that, the phenomenon Kahan calls social influence can raise or lower the crime rate from what it would be if only direct sanctions were operative. He concludes that, even in the absence of law, norms convey information about the effectiveness of law. Laws can both optimize the effect of norms and can help create new norms, and, because norm-change becomes self-reinforcing, small legal investments can have big payoffs.[162]

If rational choice theory imagines people as cold calculators, and behavioral economics as partly rational creatures full of cognitive foibles and altruistic impulses, Kahan imagines people as highly sensitive sensors of norms and mores looking for, and responding to signals about, what others do and what others believe. The mechanisms for transmitting and responding to signals could take many forms, all of which are evident at some point in Kahan's article. At one point he says:

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[159] *Id.* at 367-73.

[160] Kahan's and others' linkage of these terms is disturbing, because the terms suggest and often refer to drastically different things, such as tough new computerized arrest-and-investigation schemes, and a non-adversarial social-work approach to policing, respectively.

[161] Kuhan, *Social Influence*, *supra* note 3, at 351.

[162] *Id.* at 362-65, 372-73.

> Social scientists have posited a number of explanations for the phenomenon of social influence generally. Some stress the individual rationality of conforming to behavior of other individuals, some the reputational benefits of conforming to social norms, and still others a deep-seated affinity between individuals that causes them to value conformity for its own sake.[163]

This passage somewhat blurs explanation for the alleged phenomenon with different possible definitions of it, and the last clause seems question-begging. But doubtless there are many types of social conformity out there, and Kahan cites many respectable social science studies demonstrating conformity's various forms and processes. The problem is that as we unpack Kahan's claims, the possible specific mechanisms proliferate. Consider this set:

> People see evidence of law enforcement and learn the true costs of crime.
>
> People see other individuals enjoying the fruits of crime without punishment. They thereby learn the price of crime more effectively than they do merely by learning of the penalty structure of the criminal code.
>
> People conform to the behavior of those they admire, especially those who seem to win reputational esteem from others.
>
> People conform to the behavior of the majority of individuals most proximate to them, so long as those individuals do not suffer any very obvious cost for that behavior.
>
> People see convicted criminals suffering stigma or they themselves experience stigma when they themselves break rules or norms; they are thereby sensitized to the reputational costs of deviance.[164]
>
> People undergo some deeper process of absorbing the values of others, induced by society or by the state.
>
> People will learn to act as if their beliefs conform to those of others, either for status or security, or out of some inner mechanism to finesse cognitive dissonance, but their actual beliefs do not change much.

These phenomena are not necessarily mutually exclusive, and the norms school might respond to a charge of ambiguity among these mechanisms by saying that it finds all of them. On the other hand, the multiplicity of these processes and the level of vagueness and generality with which each is defined suggest that the norms

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[163] *Id.* at 356.

[164] Stigma itself can operate in any number of ways. Kahan says: "[b]ut individuals fear stigma less when they perceive that criminality is rampant. The more prevalent criminal activity is in a particular community the less likely someone is to be condemned for it by either those with criminal records or those without." *Id.* at 357. But is stigma, which we associate with punishment, so dependent on the rate of crime? On the rate of conviction?

school is sacrificing usefulness for eclecticism. But consider how Kahan's explanatory discourse operates on specific issues.

For example, he notes that in the period from mid-1960's to the mid-1980's, American crime rose dramatically even though incarceration rates rose even higher.[165] He takes this as potential proof that imprisonment failed as a deterrent, and then infers that it must have been self-reinforcing social influence effects raised the crime rate.

> It's quite plausible to believe that the jump in the crime rate triggered the various mechanisms by which individual decisions to engage in crime reinforced each other: as they observed their peers turning to crime, individuals concluded that crime isn't particularly risky, that being a criminal doesn't necessarily threaten and might indeed enhance one's status in the community, that obeying the law is servile, and that engaging in crime isn't morally repugnant. These beliefs caused potential offenders to revise . . . downward their assessment of the cost of it.[166]

At its chosen level of generality, this fails as an explanation. It notes that crime rates were positively, not negatively, correlated with imprisonment rates, fills the apparent causal gap with various phrases suggesting that other influences were operative, and purports to describe those other influences. But even if the numbers do establish that imprisonment exhibits diminishing and ultimately negative returns, we are not left with any useful explanatory alternatives other than the entire universe of social or economic processes not controlled by imprisonment. Since the national crime rate has dropped notably in the last decade while imprisonment has remained high, Kahan presumably would argue that something has caused these other processes to reverse the course of criminal motivation. As noted below, he does cite one possible factor—broken-windows-style policing. But the efficacy of that factor in reducing crime has been greatly contested,[167] while criminologists have proliferated possible explanations of the recent crime drop—from short-term population trends to the lag effects of permissive abortion laws.[168] If

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[165] *Id.* at 361.

[166] *Id.*

[167] *See, e.g.*, Harcourt, *Reflecting on the Subject*, *supra* note 15, at 295-99.

[168] The most comprehensive new study identifies four influential factors—increases in police, increases in prison population, waning of the crack epidemic, and the legalization of abortion, and specifically refutes the influence of broken-windows-style police techniques. Steven D. Levitt, *Understanding Why Crime Fell in the 1990s; Four Factors that Explain the Decline and Seven That Do Not*, J. ECON. PERSP. (forthcoming 2004); see generally THE CRIME DROP IN AMERICA (Alfred Blumstein & Joel Wallman, eds., 2000) (collection of studies citing various factors).

Kahan's purported explanation is capacious enough to accommodate several of the proffered factors, contributes little as an explanation.

Kahan also says that the social influence theory of deterrence explains the empirical evidence that low-severity/high-certainty punishment schemes are more effective deterrents than high-severity/low-certainty schemes.[169] Of course that evidence, though useful in its consistency, merely confirms what most criminologists have been saying for decades. Indeed, this phenomenon has usually been explained by the rough intuitive judgment that criminals have super-high discount rates. That intuition may not be much of a theory of crime, yet Kahan's notion of social influence does not clearly improve on it.

Kahan reasons as follows: a regime of high-severity/low-certainty enforcement leads people to believe that crime does pay. As more people decide that crime pays, they will cease to fear reputational loss from crime, thereby "tainting obedience with connotations of servility."[170] By contrast, a low-severity/high-certainty strategy reduces the chance that people will infer that crime pays; their compliance will then sustain the certainty of conviction and reinforce stigma. In addition, the low-certainty/high-severity strategy discourages people's cooperation with the police by reducing the value of any individual act of cooperation, and also increases the risk of retaliation against those who cooperate. Moreover, severe punishments cause many law-abiding people in poor neighborhoods to feel unfairly condemned by the state, making cooperators look even more like traitors (even though there are fewer of them). These are all plausible possibilities, but at this level of generality, they operate as suggestive assertions, not analytically useful mechanisms. Indeed, they speak, at best, at about the level of the "policy" arguments law professors elicit from students to teach them the rhetoric of legal conversation; as such, they can be rhetorically reversed with little loss of plausibility.

Kahan then credits the broken-windows style of policing with lowering the serious crime rate in New York City, citing journalistic sources, but also relying on one empirical study by Wesley Skogan.[171] Empirical issues aside for the moment, Kahan claims that the new policing has worked in part by changing the social meaning of

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[169] Kahan, *Social Influence*, *supra* note 3, at 377-78.

[170] *Id.* at 379.

[171] WESLEY G. SKOGAN, DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS (1990).

disorder.[172] Yet, as noted below, he does not enable us to disentangle fairly conventional, if indirect, forms of deterrence from this more ethereal phenomenon about belief.

Kahan's other much-noted example of social meaning engineering is the practice of paying students to turn in other youth who possess guns.[173] Again, this example does not help us to determine whether the benefits derive from practical interference or disruption, on the one hand, or image-changing on the other. In the absence of firm evidence, opposite effects can be just as easily imagined—including severe harm inflicted on youth identified as police cooperators.

Kahan uses gangs as another key example.[174] Gangs are a laboratory of contagious social influences. Conventional punitive efforts to deter gang membership fail, Kahan says, because they do not address, or only reinforce, the positive meaning-influence of gang membership. On the other hand, Kahan argues that municipal anti-gang ordinances do reduce gang membership, suggesting such mechanisms as dispersals and curfews interfere with the opportunities for gang leaders to win conformity by exhibiting gang behavior and gang-related esteem. Constitutional and empirical questions aside, it is not clear what the notion of influence or meaning adds to what might otherwise be a pretty blunt instrumental analysis here. Gang members need to be in touch with each other to act as a gang; leaders need proximate followers they are to lead.[175] One can just as readily imagine widespread resistance to and evasion of these measures exacerbating gang activity, driving it further underground, etc. Evidence may prove one possibility true and the other false, but laying out the obvious possible causal tracks does not advance us very far.[176]

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[172] Kahan, *Social Influence*, *supra* note 3, at 370-71.

[173] *Id.* at 364-65.

[174] *Id.* at 373-77.

[175] Kahan insists that being adjudicated a delinquent only enhances a gang member's status; yet he is equally confident that effective incarceration in the form of curfews or bans on wearing gang colors deny them the public opportunity to enhance status. *Id.* at 375-77. Somehow the former type of instrument is counter-productive in terms of social meaning, while the latter examples succeed in denigrating the social meaning of criminality. These distinctions seem empirically unconvincing and perhaps even conceptually incoherent.

[176] A side point is that Kahan questions whether private enforcement can replace public deterrence. *See id.* at 385-89. He questions the economic arguments for interchangeability between them, because they differ qualitatively in their social meaning—or might differ. Private deterrence efforts, such as barred windows, signal concession to disorder and lack of faith in public deterrence and society's willingness to condemn. On the other hand, he

2. The Problem of Constitutional Rights.

Pursuing a deliberately contrarian line, Kahan argues that constitutional restraints on police or prosecution weaken the efficacy of the criminal law in people's minds, granting a moral victory to criminals. He calls this the "expressive effect of rights."[177] But here, more than elsewhere, the argument is too general to be useful. At the level of high publicity, the most striking recent example of a criminal getting off on a "legal technicality" and causing profession of public distrust in the criminal justice system was O.J. Simpson, but it hardly seems likely that his acquittal caused any increase in crime of his, or any other, sort. As for the varieties of the exclusionary rule, whether they lead to fewer convictions or prosecutions and thereby raise the crime rate is highly contestable. We do not know whether as social symbols they weaken people's faith in the condemnatory power of the criminal law, because this social phenomenon of faith is too amorphous to be measured. In some "communities," it is the nonenforcement of the Fourth Amendment that causes loss of faith in criminal justice as a legitimate condemnor of deviance. So on this subject, because of the common political demagoguery over "legal technicalities," Kahan inadvertently comes closest to reinforcing a troubling kind of populist argument.

Kahan might of course argue that the key question is whether constitutional decisions nullifying prosecutions lead people to believe that crime is increasing. He argues that any such popular perception will lower commitment to obedience, reinforce criminal propensities, and reduce the stigma attached to criminality, and he then repeats his assertions about the effect of increased crime on the social meaning of the state's deterrent devices. Specifically, he says, increased crime encourages law-abiding people to invite gangs to become the de facto local police in a neighborhood. But it seems highly implausible that a few successful suppression motions in drug or gun cases spurs an increase in inner-city crime. It seems even more implausible that middle-class whites, the populist icons most prone to anger about liberal judges' decisions, are moved to criminality to as a result of these decisions. If anything, their anger has turned into the general

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concedes that context makes all the difference, since the "message" in wealthier community watch campaigns may be more influential. But he also notes how more successful public deterrence may either weaken or strengthen the need for private deterrence. It is unclear whether increased private deterrence efforts in poorer neighborhoods actually increase distrust and a sense of disorder, simply have no effect.

[177] *Id.* at 390.

kind of law-and-order conservatism, often tinged with racism, that was spurred by Nixon's "Southern Strategy" in 1968 and enhanced by the evolution of the "Reagan Democrats" some years later.

According to Kahan:

> Severe penalties . . . might compensate for the effect of rights in reducing the probability of conviction, but they don't counteract the inferences that citizens draw when they learn that convictions are being reversed because of "technicalities," or when they see disorder in their streets. Accordingly, even if severe penalties restore the price of crime to its pre-rights level, they won't completely offset the negative effect of rights on deterrence.[178]

How in the world is this equation to be tested? Is it supported by the simultaneous rise of the crime rate and of the Warren Court jurisprudence of the 1960's? Is it refuted by the continuation of the rise in the crime rate under the Burger Court? Is it then confirmed by the drop in crime under the 1990's Rehnquist Court? By what mechanisms, and in what way, does the pubic draw its conclusions about these technicalities? Has the "impeach Earl Warren" trope of the late 1950's so embedded itself in American politics that no actual changes in exclusionary rules make any difference? Was the prolific work done by the last two Supreme Courts in curtailing Fourth and Fifth Amendment rights undone in the public's mind by the occasional decision in favor of a constitutional claim, such as the recent decision nullifying a municipal gang-loitering ordinance?[179] Has not the success of "three strikes"-type legislation, aimed directly at severe penalties, had much more salience than constitutional litigation?

Kahan concludes that the social influence conception reveals the utility of order-maintenance policies and gang-loitering laws, which, though they have little direct effect on the price of crime, nevertheless manage to suppress criminality. Like much in his paper, this is a non sequitur, or in any event is empirically untestable at the level on which it verbally operates.

Most of the claims Kahan makes about broken windows policing have been convincingly refuted.[180] The gist of Harcourt's rebuttal is as follows: for one thing, the Skogan research on which Kahan relies is hopelessly flawed. Second, the so-called order-maintenance policing did not in any coherent way change the "meaning" of anything, nor did it alter the usual mechanisms of deterrence. Rather,

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[178] *Id.* at 392-93.

[179] *See, e.g.*, Chicago v. Morales, 527 U.S. 41 (1999).

[180] *See* Levitt, *supra* note 168, at 10-12.

staying well within the boundaries of conventional punishment theory, it relied on increasing certainty over severity and signaling arrest policies. Third, the claim that this type of policing altered social meaning depends on arbitrary assumptions about the social "subjects" for whom the meaning is relevant.[181]

But let me render the critique more general. In imagining how rational actors in a social system calculate costs and benefits, the "social influence concept of deterrence" offers no mathematical rigor, no theory of efficiency, no insights into risk aversion. As a matter of sociology, in the form presented by Kahan, it avoids any concrete description of institutional dynamics and equilibria, much less empirical fact. Identifying "social norms" in this context avoids treatment of exactly what police do, whether they are playing social worker and using legal authority to help catalyze social belief, or simply using conventional enforcement devices very aggressively in ways that can effect large changes in social behavior. And to the extent it relies on game theory, it takes common sense notions of how people are likely to behave under certain conditions, and gives them memorable names—like "sticky norms" or "gentle nudges" or "hard shoves"[182]—but adds little to our understanding of the limits of reason under limited information. Rather, the social influence approach epitomizes the core problem of law and norms scholarship generally—that is, it demonstrates that notions like "influence" or "norm" are too vague to be useful, while they seduce us with the promise of a social science rigor redeemed by great suppleness and even humanistic understanding.

Kahan's critique of constitutional criminal procedural rights is also telling. Here, I am not concerned with it as a constitutional theory; indeed I will not even bother arguing that he underestimates the strength of the individual rights interests that it would subordinate to deterrence. Rather, I am concerned that it also portrays society in a way that encourages a dangerously unwitting acquiescence to populism, and a dangerous indifference to the way institutions, including politicians and the media, can invent norms which people allow to be imputed to them. The norms scholarship thereby risks complicity in an aspect of our political culture which it should be the distinct role of scholarship to combat.

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[181] Harcourt, *Reflecting on the Subject*, *supra* note 15, at 295-299.

[182] *See infra* notes 233-276 and accompanying text.

B. REGULATING CRIME IN THE INNER CITY: THE "PRO-SOCIAL" INFLUENCE

Most of the arguments and claims in *Social Influence, Social Meaning, and Deterrence* are repeated in Kahan's and Tracey L. Meares's *Law (and Norms) of the Inner City*,[183] but here the norms approach is made part of a more fervent methodological manifesto. Kahan and Meares argue that the norms-and-social-influence approach offers an "especially plausible explanation for crime in the inner city, where the density of the population multiplies social interactions and magnifies the reverberations of disorderly norms through the community."[184] They claim to offer an "intensely practical agenda," because "norms are created through social dynamics that are important enough to be worth regulating but discrete enough to be regulated efficiently."[185]

Most boldly, they argue that norms analysis is sufficiently promising a policy tool that it should win them some disinhibition from social science craft norms.[186] That is, they request freedom from the demanding standards of social scientific proof, because the urgency of the problems they face demands action before that proof is available, and, under these conditions, norms analysis has sufficiently respectable explanatory and even predictive power. Kahan and Meares say that even where the norms approach seems to offer, at best, subsuming explanations rather than scientific bases for prediction (i.e., such behavioral economic explanations as adaptive preferences, wishful thinking, behavioral spillover, or displacement) it might, at best, usefully generate normative insights "insofar as our appraisals depend on knowing how the world came to be the way it is."[187] Finessing the difference between explanation and prediction, they suggest that, even if their approach cannot have predicted some destructive social condition, it can help to counteract or exploit it.[188] Kahan and Meares declare then that social norms work "pregnant with explanatory insights into the nature of inner-city crime."[189] And these insights in turn generate "normatively attractive policy prescriptions," including curfews, gang-loitering laws, reverse stings,

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[183] 32 LAW & SOC'Y REV. 805 (1998) [hereinafter Kahan & Meares, *Law (and Norms)*].

[184] *Id.* at 806.

[185] *Id.*

[186] *Id.* at 806-07.

[187] *Id.* at 808.

[188] *Id.*

[189] *Id.*

and police-sponsored prayer vigils, which, they say, find sufficient grounding in norms analysis to pass what they call the "political confidence" test.[190]

Kahan and Meares suggest that where harsh punishment does not work and drastic income redistribution is infeasible, certain norms can produce or enhance a phenomenon called pro-social organization[191] and thereby can reduce crime. They are imprecise about what those norms are, other than general notions about self-restraint from crime. But Kahan and Meares assume that varieties of social links can convey the meaning of these norms in such an influential way so as to reduce crime. It is indeed not clear what we gain by calling these things norms at all: they are, as depicted by Kahan & Meares, simply forms of positive adult influence manifested by close supervision, mentoring, parental involvement in PTAs, abetted by teenage groups that reinforce the good norms and trusting relationships among police and civilians through "community policing." One might ask whether these things can be differentiated from the effects that greater income redistribution would bring, but we might grant for the moment the argument that empirical evidence shows that this notion of "collective efficacy" might operate independently of income levels.[192]

As support for this view, Kahan and Meares rely on research by Robert J. Sampson and others on the notion of "collective efficacy," and, in particular, on a study of social constraints on crime in Chicago neighborhoods.[193] This research purports to find crime-reducing effects in neighborhoods quite distinct not only from formal controls by police and courts, but also from standard demographic and socioeconomic status (SES) factors. Under the term "collective efficacy," the Sampson study includes such informal social mechanisms as "monitoring of spontaneous play groups among children, a willingness to intervene to prevent acts such as truancy and street-corner 'hanging' by teenage peer groups, and the confrontation of persons who are exploiting or disturbing public space."[194] In other words, "collective efficacy" is essentially the

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[190] *Id.* at 807-08.

[191] *Id.* at 810.

[192] *Id.* at 809.

[193] Robert J. Sampson, et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCIENCE 918 (1997).

[194] *Id.* at 918.

willingness and ability of individuals to engage the public good out of a sense of "mutual trust and solidarity among neighbors."[195]

There is something suspiciously too logical about research that shows that low-crime neighborhoods perfectly resemble our image of low-crime neighborhoods. But the Sampson study does itself acknowledge most of the limitations implicit in its design and conclusions. The study looks at factors in layers: it starts with very conventional measures of SES-type conditions, factors which they label "concentrated disadvantage, immigrant concentration, and residential stability."[196] Sampson, *et al.* then augment those with semi-measurable control factors such as "organizational participation and neighborhood services." They then build up to collective efficacy, acknowledging that indicators of informal control and social cohesion cannot be observed directly but must be inferred from informant reports. These reports are based on survey questions: the questions ask about such things as whether respondents believe there is mutual trust in their neighborhoods or whether their neighborhoods are close-knit in general. More specifically, they ask whether respondents believe their neighbors would intervene to help them or their children if in danger, or would collectively respond to some deficit in public services.[197] The authors conclude that the SES-type factors explain seventy percent, but not all, of collective efficacy, and that collective efficacy, along with, and somewhat separate from organization and neighborhood services, seems inversely correlated with crime.[198]

1. Critique of Collective Efficacy

The Sampson study leaves wide open the question of the direction of causality between collective efficacy and crime, or the question whether low crime and these informal social controls are both the effects of deeper causes which the paper cannot address. Sampson, *et al.* surmise that "collective efficacy appeared to partially mediate widely cited relations between neighborhood social composition and violence."[199] But, even so, this set of links seems hard to disentangle from the set of conditions that we would expect to find in those neighborhoods with low crime rates. Nevertheless, in

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[195] *Id.* at 919.
[196] *Id.* at 920.
[197] *Id.* at 919-20.
[198] *Id.* at 923.
[199] *Id.*

drawing on the Sampson study, Kahan and Meares confidently, if ambiguously, assert that

> the level of supervision of teenage peer groups, the prevalence of friendship networks, and the level of neighborhood participation in formal and voluntary organizations like PTAs, local school boards, and community policing organizations help to explain the often-noted link between the structural characteristics of a community (such as race, family disruption, and low economic status) and crime.[200]

Proper norms thus apparently will emerge if the social structure is the right one, but Kahan and Meares fail to rebut the suspicion that the right social structure is caused, or actually constituted, by the right norms, since, other than self-restraint from crime, the processes described here are in some ways the best norms themselves.

Kahan and Meares assert that law can assist here by lending the decisive marginal assistance to an otherwise sound structure—so that parents can fulfill their supervisory roles if simply abetted by curfews. On the other hand, tough arrest strategies are said to thwart these efforts by creating the discomfiting impression that crime is insolubly rampant. In terms of examples, Kahan and Meares repeat the argument about the efficacy of order-maintenance policing that cracks down on panhandling, graffiti, prostitution, and public drunkenness. Deterrence, they insist, cannot explain why such policing would reduce violent crime, nor does it affect underlying social conditions, and thus it is "likely to prevent crime through its effect on social influence."[201] They note that unrepaired broken windows exert a normative social influence that ultimately leads law-abiding people to leave the area. But this is also a sociological phenomenon long-documented, and it is a material phenomenon that gains no clarity from the vocabulary of social meaning in the Kahan-Meares sense. Indeed, the very fluidity of the population in these neighborhoods only underscores the difficulty of conducting any useful discourse about norms when one relies on an unexamined word like "community."[202]

2. The Example of Guns

As for gun possession, while continuing to assert that it results from "social influence," Kahan and Meares seem to concede that it may result from a fairly mundane matter of defensive fear: "[o]nce a

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[200] Kahan & Meares, *Law (and Norms), supra* note 183, at 811.

[201] *Id.* at 822.

[202] *See* Robert Weisberg, *Restorative Justice and the Dangers of Community*, UTAH L. REV. (forthcoming 2003).

few youths outside of the drug market acquire guns, the perception that gun carrying has become a general phenomenon rather than a drug-specific one can generate higher levels of fear among youths, which in turn support ever higher levels of gun carrying."[203] But they cite one study to suggest that students report carrying guns in order to impress friends, and thereby conclude that gun-possession is "infused" with social meaning. Aggressive direct police attacks on gun possession are said to "reinforce the message of defiance associated with gun possession and thus *increase* the expressive value of that behavior."[204] Conversely, bribing youths to turn in fellows who possess guns is said to give them an incentive to dissociate themselves from this imagery. Kahan and Meares describe this as "a policy that is believed to be effective."[205]

> When students fear that their peers will report them, they are less likely to display their guns; when students are reluctant to display them, guns become less valuable for conveying information about attitudes and intentions. In addition, the perception that onlookers are willing to sell out possessors counteracts the inference that possessors have enough high status among their peers. Encouraging snitching thus reduces the incidence of gun possession both by deconstructing its positive meaning and by disrupting behavioral norms—including the ready display of guns—that are essential to that activity's expressive value.[206]

Thus, this program worked because its deterrent effects were "multiplied by its positive influence on norms that determine whether gang members and non-gang members decide to carry guns."[207] But the empirical evidence for the success of these efforts is troublingly thin, and "social meaning analysis" here yields a surfeit of possible interpretations.[208] After all, why would the cooperators not suffer grave social stigma?[209]

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[203] Kahan & Meares, *Law (and Norms)*, *supra* note 183, at 825.

[204] *Id.* at 825.

[205] *Id.* at 822.

[206] *Id.* at 825. Kahan and Meares acknowledge, but never really refute, the argument by David Kennedy that an order-maintenance anti-gun program in Boston was essentially just a classic deterrent crack-down. *See* David Kennedy, *Pulling Levers: Chronic Offenders, High-Crime Settings and a Theory of Prevention*, 31 VAL. U. L. REV. 449, 466-68, 475 (1997). Coincidentally, the violent crime rate has now begun an alarming new rise in Boston, arguably because the tough crackdown approach gave way to the community-minded interventions celebrated by Kahan, Meares, and others. *See* Frances Latour, *City Strayed From Strategy on Violence, Co-Creator Says*, BOSTON GLOBE, July 5, 2002, at B1.

[207] Kahan & Meares, *Law (and Norms) supra* note 183, at 826.

[208] Harcourt, *After "The Social Meaning Turn"*, *supra* note 15, at 183-86.

[209] Harcourt himself has taken up the challenge of lending some substance to the question of the "social meaning of guns." Bernard E. Harcourt, *Measured Interpretation:*

Similarly, Kahan and Meares insist that reverse drug stings (in which undercover police act as sellers, not buyers) alter the social meaning of drugs.[210] But it is standard criminology now to view these stings as cost-effective as a conventional market intervention, and though redistribution of the stigma of drug arrests obviously helps the morale of the "community" in which the sellers live, this is the necessary result of changing police targets and has nothing to do with norms more generally.

2. The Church-State Linkage

The most notable aspiration in the Kahan-Meares inner-city program to change norms is to encourage cooperation and trust between two key agents—the church and the police. They cite a few examples of (unquestionably laudable) efforts to link police and church leaders and conclude:

> Rather than a public-centered notion of law enforcement, which envisions the police as the primary agents of social control through the utilization of a politically legitimized monopoly on force, achievement of cooperative alliances among community organizations that are facilitated by government can set the stage for "private" law enforcement, in which social control takes place primarily through the enforcement of norms as opposed to law.[211]

This is how they describe the mechanism:

Introducing the Method of Correspondence Analysis to Legal Studies, 2003 U. ILL. L. REV. 979 (2003). Harcourt set out to get the actual words juvenile inmates used in describing guns, and, relying on extensive interviews, analyzed the verbal data through highly technical statistical-linguistic devices that, Harcourt notes, are closely tied to European structuralist philosophy. *Id.* at 984-87. He uses these techniques to determine relevant emphases, contexts, and linkages of expressions and ideas. Thus, for example, he tabulates responses in terms of the juveniles' expression of interest in guns in terms of such "primary meanings" as protection, belonging, danger, attraction, power, recreation, respect, self-defense, suicide, and revenge. *Id.* at 991-98. Harcourt then cross-checked the expression of these meanings with background information about the respondents—i.e., whether they own or carry guns, their arrest records, and so on. He concludes by tentatively assaying the possible practical implications of this analysis for law enforcement. Many of his conclusions are fairly intuitive—such as that regular carriers of guns are associated with "action/protection" markers, while less frequent carriers are linked to "recreation/commodity" markers. But a few are interestingly counter-intuitive. For example he infers that gang members are more linked to carrying and action/protection markers, so that non-gang users, who tend to view guns more as economic commodities for exchange, are more susceptible to rational choice incentives. In addition, he notes a disproportionate attraction to guns as a way of "belonging" for youths who have never been incarcerated, thereby suggesting that a "taste of jail" may be very effective here. *Id.* at 1002-09.

[210] Kahan & Meares, *Law (and Norms), supra* note 183, at 827.

[211] *Id.*

> Law enforcement agencies are uniquely situated to provide resources and direction for organizational efforts by private individuals and groups. Participation by residents in community policing programs is itself an aspect of local community solidarity. Such activity, moreover, not only reinforces the community social processes that prevent crime but also constructs and transmits law-abiding norms. . . . The newly formed connection between the church and the police has produced new species of social capital that can be directed at violence control: the police have access to new sources of information that can assist them in criminal investigations, and church leaders have been assured of greater responsive members to the crime affecting their congregants. Church leaders are now even playing an active role in recruiting and screening police academy applicants from their congregations.[212]

As for the prayer vigil, "the commander's requirement that each corner post at least ten individuals created opportunities for the members of various churches to meet each other."[213]

It would be churlish to deride this example as a sentimental example of a "faith-based initiative" or to link it to some Foucauldian conspiracy to enlist all the disciplines in social mind and behavior control. Indeed, as a matter of urban policy the church-police partnership is clearly admirable. But Kahan's & Meares's use of the example raises, but does not help resolve, the question of what deeper social conditions made this link possible, and of what specific immediate conditions that might make it successful. Moreover, the proposal to deploy church leaders seems overly optimistic about the risks of "privatizing" criminal law by delegating norm-changing power to non-state forces, eliding the difference between the obvious and unregulated effect of private influence on criminal behavior and the state's deliberate appropriation of private organizations.[214]

We learn nothing about what motivated the police, and have no idea if curfews had bad externalities. Each type of behavior Kahan and Meares discuss carries multiple possible, and changeable meanings, and nowhere can we be sure that it was the force of, or internalization of, a norm that made a difference, as opposed to rational choice.

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[212] *Id.* at 827-29.

[213] *Id.* at 828-29.

[214] *See, e.g.*, Dan M. Kahan, *Privatizing Criminal Law: Strategies for Private Norm Enforcement in the Inner City*, 46 UCLA L. Rev. 1859, 1870-71 (1999) (conceding some of the risks of privatization but insisting that the only alternative to experimentation with private sanctions is "state-sponsored behavioral regulation, including severe penalties and heavy-handed street policing") (emphasis omitted).

3. Constitutional Rights in the Inner City

The perilous vagueness of the term "community" is augmented by the political significance Kahan and Meares impute to this concept.[215] They clearly mean to treat the rise of African-American influence in city politics as a "constitutional moment"—a change in national political and social values so broad and dramatic as to amount to, and to call for, changes in constitutional doctrine.[216] And they mean to remind liberal readers not just that blacks are the major victims of inner city crime, but also that African-American residents answer polls with remarkably mainstream or conservative views on criminal justice policies. But the authors' failure to distinguish such notions as "residents," "citizens," and "community" renders perilous their constitutional and political conclusions, especially since the degree of local control over crime is hugely dependent on structures of urban politics and districting which they only vaguely address. Kahan and Meares offer us a strange kind of identity politics—a moral relativity of constitutional concerns, or a kind of identity-politics federalism. They pay fealty to liberal constitutional concerns by conceding or assuming that individual liberty is a dominant, if not the dominant, value, but they note: "[t]he only way to figure out what their net effect on liberty is under the circumstances is to determine if the norms [that elements of community policing] regulate are welcome or unwelcome by a majority of the persons who are subject to them."[217] Kahan and Meares assume that people need legal reinforcement to be able to refuse to act a certain way, and so, in their view, legal restrictions "free" people from having to obey norms. Whether liberty is decreased or increased depends on how many individuals resented the norm and how intensely they resented it before the law went into effect, a matter, Kahan and Meares say, that is beyond the empirical power of judges to determine.

> But assuming the law is one that affects the average citizen in a meaningful way, she *can* determine through introspection whether the norms that fuel the regulated conduct are welcome or unwelcome. Indeed, the overwhelming support of inner city residents for the elements of the new community policing is strong evidence that these laws are liberty enhancing on net.[218]

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[215] *See* Weisberg, *supra* note 202.

[216] *See* BRUCE ACKERMAN, WE THE PEOPLE, TRANSFORMATIONS 87-88 (1998) (discussing constitutional moments).

[217] Kahan & Meares, *Coming Crisis*, *supra* note 20, at 1182.

[218] *Id.*

Harcourt refutes most of the empirical claims about the efficacy of gang ordinances and gun-snitch laws on which Kahan and Meares rely.[219] Moreover, he notes that even where those policies find support in empirical correlations, that hardly proves that anything "normative" changed in the behavior.[220] Harcourt concludes that more "Geertzian" research is needed, and stresses that it needs to have the highly self-conscious anthropological self-awareness promoted in much cultural anthropology.[221] As he notes, Kahan and Meares continue to hedge their bets by saying that their claims are speculative and have yet to be tested. But this is a very insufficient concession, because, given the vagueness of their concept of mechanisms of norm transmission, Kahan and Meares have not proffered a sufficiently coherent set of hypotheses to be tested; rather, they have approved a variety of unrelated policies, all of which beg for empirical testing.

In a separate paper, Kahan connects this notion of collective efficacy to the theory of reciprocity, a component of game theory.[222] This paper posits an important refinement of rational choice theory—that people will take somewhat self-sacrificial actions so long as they believe that others will do so as well. Thus, the assurance that others will not free-ride is the best goad to selfless communal action. But left unanswered in Kahan's application of this reciprocity principle to law is the question of what factors can cause mutual trust to arise.[223]

The use of this game-theoretic principle here accomplishes little in terms of application to criminal justice. Kahan repeats his common trope that some version of his theory has "explanatory and prescriptive" power, and he claims a dramatic insight in linking reciprocity theory to a broad umbrella called "New Community Policing."[224] By this Kahan means a lot of different things, including

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[219] Harcourt, *After the "Social Meaning Turn"*, *supra* note 15, at 183-86, 191-94.

[220] *Id.* at 193-94.

[221] *Id.* at 189.

[222] Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 CAL. L. REV. 1513 (2002) [hereinafter Kahan, *Reciprocity*]; *see also* Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. REV. 333 (2001).

[223] In a sensible and useful paper, Peter Huang and Ho-Mou Wu use game theory to show that, assuming some modicum of trust in other agents' sincerity and reliability, this mutuality of trust can be greatly beneficial in solving collective action problems and reducing costs by enabling informal norms to reduce corruption. *More Order Without Law: A Theory of Social Norms and Organizational Cultures*, 10 J. L. ECON. & ORG. 390 (1994). The key here is that the authors make no claims to establish the source or prevalence of this trust and hence make no claim to global legal recommendations.

[224] Kahan, *Reciprocity*, *supra* note 222, at 1514.

the order-maintenance/broken windows policy described earlier, as well as the "community self-policing" he finds exemplified, for example, by links between church and the police. His major claim is that what he calls conventional deterrence theory—in this case focused on extra severe penalties—thwarts both of these efforts by weakening reciprocity. For example, severe penalties signal state concern for high levels of criminality and cause law-abiding people therefore to infer that other people must be lawbreakers. On the other hand (and not clearly relevant to reciprocity), heavy penalties signal such a strong state commitment to law enforcement that it crowds out motivation for community self-policing (that is, assuming they are substitutes for each other).[225] This application of reciprocity theory is simplified to fit into justifications for other earlier, highly vulnerable, proposals. Indeed, Kahan again offers perfectly good refutations of his own statements, saying, for example, that order-maintenance policing creates far more numerous encounters between police and citizens (even if over less-important violations) and might thereby aggravate community-police tensions.[226] Similarly, Kahan again acknowledges that the "privatization" of law enforcement through greater reliance on churches produces huge problems with the unintended consequences of state entanglement with religious heterogeneity.[227]

4. Labor Markets, Material Factors, and Norms

A refreshing contrast to the questionable normative grounding of the *Law (and Norms) of the Inner City* paper, and its shaky reliance on the collective efficacy study, comes in a recent paper written by Meares with Jeffrey Fagan.[228]

The Fagan-Meares paper is a critique of the hyper-punishment of African-American males in modern America. It indeed searingly criticizes a certain version of deterrence theory—the blunt kind that relies solely on the immediate direct effects of incarceration. But it makes no pretense of offering a dramatic new concept of alternative punishment or a new behavioral discipline to unpack the complexities of subjective internalization of norms. Rather, it corrects what it sees

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[225] *Id.* at 1525-26.

[226] *Id.* at 1529.

[227] *Id.* at 1535.

[228] JEFFREY FAGAN & TRACEY L. MEARES, PUNISHMENT, DETERRENCE AND SOCIAL CONTROL: THE PARADOX OF PUNISHMENT IN MINORITY COMMUNITIES (Col. Pub. Law & Legal Theory, Working Paper No. 10, 2000).

as a futile and counter-productive version of deterrence theory by recalling the more nuanced principles of truly classical deterrence theory. And it then elegantly demonstrates that this classical theory always assumed that the indirect effect of incarceration on the informal social controls of society was a key element in deterrence.[229]

Moreover, and more important, Fagan and Meares cast their view of social control and order in the fresh direction of linking the efficacy of social organization to material matters generally, and to the relative state of the legal and illegal labor markets and the effect of unemployment on the marriage rate more specifically.[230] They also rely on conventional categories of sociology, such as notions of social conformity and social deviance, to explain how informal social controls work.

Fagan and Meares make it clear that informal social controls are meaningfully discerned only in "specific social conditions" which require a very concrete sense of economic context. They also address the effect of highly concrete legal and social forces, such as the unintended consequences of school bussing on the stability of neighborhood organization and the resulting susceptibility of bussed youth to gang recruitment.[231] They recognize that the key context for the experience of social control is the general phenomenon of work, not some amorphous notion of "community life," adding that the attractions of gangs and other sources of antisocial organization substantially depend on the opportunities they offer for income. Moreover, Fagan and Meares draw on a rich body of classical sociological doctrine that traces the effect of material circumstance down even to the level of marriage stability, where domestic violence breeds in the "failed economic enterprise" of a marriage and leads to social disorder.[232] They trace the specific criminogenic effects of the return of former inmates to neighborhoods, with their already weak and destined-to-be-weaker investment in positive social capital, along with the loss of the informal networks that make access to future labor feasible. Finally, Fagan and Meares offer an extremely nuanced version of the phenomenon of legitimation of the criminal justice process, noting considerable differences among racial or ethnic groups in the degree to which their acceptance of the

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[229] *Id.* at 6-11.

[230] *Id.* at 9.

[231] *Id.* at 17.

[232] *Id.* at 27.

legitimacy of the system depends on outcome equity or procedural fairness.

This paper might be said to revisit the same terrain, and, at a very high level of generality, it might be said to take the same tack—of criticizing standard deterrence theory for failing to appreciate the role of informal social controls and norms on constraining crime. But the resemblance to *Law (and Norms) of the Inner City* stops there, and the dramatic difference in these projects only helps to illustrate the intellectual danger of relying on "social norms" and "social meaning" as useful explanatory concepts.

C. THE PROBLEM OF STICKY NORMS

1. The Concept of Stickiness

If the law-and-norms school claims to have identified for the study of criminal law a distinct social phenomenon called norms, allied with distinct components called social meaning and social influence, then perhaps the boldest statement of this claim comes in Kahan's recent article about "sticky norms."

> I believe, however, that the problem of sticky norms reflects the primitive understanding of how laws and norms interact. I want to suggest a more realistic account, one that should help reformers see how the law can be used to make sticky norms become unstuck.[233]

Kahan also asserts as his objective "to demonstrate the appropriate and mutually reinforcing contributions that theory and empirics make to analysis of the sticky norms phenomenon."[234] Thus, Kahan's initial premise of "sticky norms" analysis is to be value-free; he does not intend to tell us which norms should be changed by law, but rather how to employ incrementalism to enhance the efficacy of any legal or normative change otherwise desirable. The simple point is that if the law gets too far ahead of society, nullification may only reinforce the norm and weaken the legal signal. At first glance, this recalls a very old debate about over-criminalization, focusing on drug and other sumptuary crimes in particular, that arose at the time of the drafting of the Model Penal Code (MPC). Thus, Sanford Kadish and the drafters of the Model Penal Code argued decades ago that trying to punish what society does not condemn will only weaken respect

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[233] Kahan, *Gentle Nudges*, *supra* note 24, at 608.

[234] *Id.* at 622.

for the law.[235] Likewise, Paul Robinson, without any need for the apparatus of norm theory, recently has quite sensibly demonstrated that the drafters of the MPC must have compromised their consequentialist goals in the name of concession to popular retributivist views.[236]

Kahan, however, not acknowledging this established line of debate, believes he can offer a bold new explanatory scheme. He cites "empirical evidence that shows that individuals have a taste for punishing others who violate norms, prefer to reward those who behave consistently with norms, and favor proportionate over disproportionate sanctions when punishment is due." He also notes that: "[e]mpirical evidence also shows that all else equal, individuals prefer to carry out their legal obligations,"[237] and he concludes that a person's "desire to discharge her duties makes her willing to enforce a law that she personally regards as unduly condemnatory, although only up to a point."[238] From this he draws the following deduction:

> If the law condemns the conduct more substantially than does the typical decisionmaker, the decisionmaker's personal aversion to condemning law too severely will dominate her inclination to enforce the law, and she will balk. Her reluctance to enforce, moreover, will strengthen the resistance of other decisionmakers, whose reluctance will steel the resolve of still others triggering a self-reinforcing wave of resistance.
>
> If, however, the law condemns the behavior only slightly more than does the typical decisionmaker, her desire to discharge her civic duties will override her reluctance to condemn, and she will enforce the law. Her willingness to enforce will now strengthen the willingness of other decisionmakers to enforce, which will in turn reinforce the inclination of others to do the same. In the resulting wave of condemnation, lawmakers will be able to increase the degree of condemnation reflected in the law without prompting resistance from most decisionmakers.[239]

A few mathematical graphs are used to illustrate this point.[240] Kahan invents a utility function that is the sum of three variables: the person's personal view of the right severity; her commitment to

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[235] Sanford Kadish, *The Crisis of Overcriminalization*, 374 ANNALS 157, 160 (1967); MODEL PENAL CODE AND COMMENTARIES, (Official Draft and Revised Commentaries) Pt. II, at 435-36 (1980).

[236] Paul Robinson, *The Legal Construction of Norms: Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive versus Normative Crime Control*, 86 VA. L. REV. 1839 (2000).

[237] Kahan, *Gentle Nudges*, *supra* note 24, at 612.

[238] *Id.* at 613.

[239] *Id.* at 608.

[240] *Id.* at 610, 612, 616.

discharging her duty; and the propensity to confirm to the actions or standards of other decisionmakers. He then makes a graph out of this function. But it does not do what graphs should do. It does not translate difficult verbal formulations into clarifying pictures. Nor does it illustrate a mathematical equation. Rather, it obscures and aggrandizes a fairly straightforward simple verbal assertion. Kahan's graphs then rely on "empirical evidence" that, for example, other things being equal, people, prefer to carry out their legal obligations. Here is the explanation for the one of three graphs:

> As the severity of condemnation moves from 0 toward what *I* personally regards as appropriate, the value of P increases; as severity exceeds what she personally regards as appropriate, the value of P decreases, and at some point becomes negative, at which point she declines to enforce. This relationship is consistent with empirical evidence that shows that individuals have a taste for punishing others who violate norms, prefer to reward those who behave consistently with norms, and favor proportionate over disproportionate sanctions when punishment is due.[241]

Kahan then relies on highly focused studies of small group dynamics—like judicial panels—to develop his point about cascading responses to legal stimuli, but he leaves unexplained how these studies bear on the behavior of the wide variety of institutional actors he lumps under the term "decisionmakers."

> The phenomenon of "group polarization" refers to the tendency of deliberating individuals to migrate toward the extremes rather than the middle. If opinion within a group starts out as only modestly weighted toward one position or another on some factual or evaluative issue, it is likely to end up decidedly skewed toward that position as individuals learn how others feel and why. Convincing experimental and empirical data suggest that "group polarization" looms large in the behavior of juries and judges. It is plausible to believe that the same dynamic affects the opinions of other types of decisionmakers as well—from police officers to prosecutors to private citizens—as they compare views on whether a particular law warrants aggressive or only lax enforcement.[242]

Kahan then goes on the provide more graphs and even more elaborate-sounding explanations of "equilibria":

> [I]f decisionmakers in *tn* perceive that about half of the other decisionmakers are enforcing, then about half will choose to enforce in *tn+1*, which means that about that many will enforce in *tn+2* . . . But the middle equilibrium is relatively fragile. If as a result of some exogenous shock, *more* than fifty percent are induced to enforce in *tn* (say, sixty percent), then an even higher percentage than that will be willing to enforce in *tn+1* (seventy percent), leading to still higher percentage in *tn+2*, and so forth and so on until the enforcement level tops out at the equilibrium at the upper right hand

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[241] *Id.* at 612.

[242] *Id.* at 614-15.

> corner. . . . The corner equilibria, moreover, are relatively durable: exogenous shocks may result in temporary boosts or drops in enforcement but unless they are big enough to push the enforcement level back across the fifty percent tipping point, the enforcement level will settle back into the corner equilibrium form which it started.
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> . . . .
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> But if an increase in severity is ever so dramatic that it drives enforcement below fifty percent, then the top drop off will not be temporary but will (consistent with Figure 3) spiral downwards until it settles down into the far left equilibrium. At that point, the lawmaker will be forced to reduce severity—substantially—in order to restore an adequate enforcement level.[243]

As in much of this work, Kahan claims critical self-consciousness by acknowledging the complexities for which the basic model cannot fully account. Thus he says: "[i]n some domains we might expect individual decisionmakers to be disproportionately influenced by what particular subgroups of decisionmakers (perhaps those who are most conspicuous, or those with whom she identifies on social or other grounds) are doing."[244] But these acknowledgments seem somewhat rhetorical, and in all this exposition, we get little refinement of what a norm is, or the level of generality at which it operates, and hence it is difficult to determine when a norm becomes "sticky." Perhaps we can only do so backwards—when we see that a law fails to change behavior. Moreover, we get no useful measure of stickiness, and therefore cannot tell if the model is falsified by examples (which are fairly easy to think up) of laws that appear very draconian in light of social mores. But the concept of "stickiness" seems unable to account for the great prosecutorial utility of these laws. Assuming some short-term coalition gets the law passed, such a law can operate very independently of current social mores, depending on voters' or politicians' inattention to the laws, or on some more complex politics underlying the law's persistence.

Nor do we get sufficient sense of the different institutional roles played by the actors lumped under the name "decisionmaker." To the extent there is any institutional analysis here, we are shown a triangulation between lawmaker, decisionmaker, and defendants. But the blurring of prohibitory rules, degrees of penalty, and strictness of centrally enforced guidelines is a crucial problem, as is the blurring of the roles of officer, prosecutor, juror, judge, private citizen. Kahan simply insists that these parties all act according to some combination

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[243] *Id.* at 616-18.

[244] *Id.* at 617 n.22.

of their personal opinion of the behavior, their commitment to carrying out law per se, and their commitment to imitating other enforcers. Kahan claims to have produced a formal model that moves from the "abstract and theoretical" to "concrete and factual" and "real world." Yet later he admits that his approach is "impressionistic" and nevertheless then insists that "the cumulative effect of the illustrations should demonstrate the explanatory power of the model overall, even if individual examples remain open to counter-interpretation."[245]

Many questions are left open. Where exactly is the dividing line between a "gentle nudge" and a "hard shove"? What are the relative magnitudes of the various factors? Do they vary with respect to particular laws? With respect to different sorts of decisionmakers? The answer to this last question is yes, to the point of making the argument somewhat self-nullifying. While claiming that the sticky norms approach offers a "powerful set of concepts to guide inquiry into why law sometimes succeeds in changing norms and why it sometimes fails," Kahan eventually concedes: "[g]iven the irreducibly contextual nature of social norms, the only way to progress in making the model realistic is through minute observation of the local enforcement that norms inhabit."[246] And, in general, he admits: "[h]ow to implement the gentle nudges strategy will be excruciatingly context dependent."[247]

I will deal with perhaps the most provocative example, date-rape reform, below, in the context of Kahan's and others' advocacy of shaming penalties. But on the whole, his concrete instances do not clearly jibe with his general concepts and often seem disconnected from the actual workings of the laws to which he would apply them. For example, discussing the controversial acquittal of Bernhard Goetz on attempted murder in the 1984 "subway vigilante" shooting,[248] Kahan argues that the court could have mitigated the roiling political controversy of the case by the legal innovation of allowing for a lesser included offense of "attempted voluntary manslaughter."[249] But the prosecutor and judge could have

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[245] *Id.* at 622.

[246] *Id.* at 622-23.

[247] *Id.* at 641.

[248] *See* People v. Goetz, 497 N.E.2d 41 (1986). At the end of the trial ordered by this Court of Appeals decision, Goetz was acquitted of the attempted murder charge, but was in any event convicted of a minor weapons possession charge.

[249] Kahan, *Gentle Nudges*, *supra* note 24, at 620 n.27.

authorized any number of conventional lesser assault charges anyway; their absence from the case probably resulted from a gamble by both prosecution and defense to play risk-preference.

2. The Example of Drunk-Driving

One of Kahan's examples is drunk-driving, where he notes that criminal law deterrence has improved. He warns: "[i]t is difficult to disentangle the respective contributions that increasingly condemnatory norms and severe penalties have made to the reduction in drunk driving in the last 10 to 15 years."[250] But then he asserts: "[s]ocial science studies link this change less to an increased awareness or fear of criminal penalties than to a heightened sense that drunk driving is socially unacceptable. *Shame* has repaired the deterrence breach."[251] Unfortunately, the studies he cites support the concern about the difficulty of disentanglement, not the conclusion about shame having repaired any breach. These studies credit formal legal changes, including increased penalties and lowered blood-alcohol limits (not to mention the advent of drunk-driving second-degree murder convictions in several states) with at least substantial part credit for the reduction; moreover, these studies attribute much of the survey response data on normative disapproval of drunk-driving to heightened awareness of these legal changes.

Kahan does cite one key study in support of his claim for the independent power of shame sanctions, because it correlates sharp reductions in drunk-driving with such "moral" campaigns of the sort associated with Mothers Against Drunk Driving (MADD).[252] And the authors of that study do indeed believe that the moral crusades were better at effecting short-term reductions than legislation pragmatically aimed at increasing the certainty of conviction and actual perceived increases in the certainty of prosecution. Yet Kahan ignores the central caveat of the study:

> Whether the threat of shame for drunk driving could have increased independently, without the legislative ferment that accompanied the moral crusade, is a question we cannot answer. In the case of the drunk driving issue during the 1980's, the appeals to

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[250] *Id.* at 634.

[251] *Id.* at 633 (emphasis in original).

[252] Harold G. Gramsick, et al., *Reduction in Drunk Driving as a Response to Increased threats of Shame, Embarrassment, and Legal Sanctions*, 21 CRIMINOLOGY 41 (1993), cited in Kahan, *Gentle Nudges*, *supra* note 24, at 633.

> conscience and the legislation coalesced. Perhaps the legal changes were a necessary symbolic prerequisite for changes in the moral factor.[253]

In his own review of legal developments, Kahan credits the normative campaign of MADD as having played a major role, which explains why the reduction finally occurred even though laws had been toughening for decades earlier. But MADD was intimately involved in legal change, so he does not explain how it was an independent normative force. Moreover, his notion of a gentle nudge seems to slip from the apparent original definition—a small legal change that abets, exploits, and catalyzes normative change—into a non-legal change: "[i]nformal enforcement of the law, in the form of privately imposed stigma, was the gentle nudge that shook loose the sticky norms that condoned drunk driving."[254]

3. The Example of Smoking

Like many within the norms school, Kahan finds the regulation of smoking an irresistible subject.[255] He treats this as a great success of norms-optimizing legal regulation, concluding that early modest regulations lent smoking an image of deviance without the hard shove of total prohibition. Kahan finds especially clever the spatial restrictions on second-hand smoke. Evidence of the harm of second-hand smoke had been well-known for years but by itself neither had nor indirectly induced any deterrent effect. Yet, he notes, the new spatial restrictions seem to have quickly succeeded, even in public areas where second-hand smoke was probably not a health-hazard, because these restrictions enabled a wider moral resentment of smoking. "Zoning" and "segregation" devices have worked, Kahan believes, because they signal moral disapproval, if not condemnation, while also stopping reassuringly short of prohibition. They also reinforce the image of smokers as deviants, and this image itself catalyzes further moral disapproval. Americans, he asserts, enforce smoking laws better than do Europeans because we morally condemn smoking, "although that disposition, to be sure, has been nurtured by progressively more restrictive laws predicated, in part, on health risk."[256] Once formal laws create some expectation that smokers will reduce or hide their ugly habit, the public is empowered to express disappointment at non-compliance.

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[253] Gramsick, et al., *supra* note 252, at 61.

[254] Kahan, *Gentle Nudges*, *supra* note 24, at 634.

[255] *Id.* at 625-28.

[256] *Id.* at 627.

But the mechanisms of deterrent social influence here remain cloudy. Why do Americans morally condemn smoking if not for health risks? Is smoking an aesthetic harm in some way distinguishable from a health harm? Or is the lag in health information relevant only as an independent spur to legislation that then catalyzed a non-health-based condemnatory response?

Despite the gaps in the reasoning here, second-hand smoke zoning rules offer a plausible, if non-falsifiable, story about how the law has cleverly walked the subtle line that enabled efficacious restrictions on smoking. But does that tell us anything about criminal justice in general, about the wide variety of criminal behavior that, unlike smoking, is associated with grave social deviance or harm or that can lead to criminal punishment?

4. The Examples of Drugs, Alcohol and Harassment

Discussions of smoking as examples of criminal justice are a bit of a lark, but they are a risky intellectual temptation for Kahan because he moves abruptly from smoking to a most serious problem of criminal justice, drug enforcement. Here is the bridge:

> When [even mild] punishments are unmet, members of the public are likely to demand more severe punishments, the enactment of which is likely to spur even more condemnatory public attitudes, which are likely to lead to even tougher punishments, and so forth and so on. This is the story behind America's spiral toward even more draconian drug laws.[257]

Kahan's concise review of the ups-and-downs of drug enforcement is a set of loose historical generalizations connected by an almost invisible causal chain. The drug laws at the end of the Victorian era were mildly, non-condemnatory nuisances—largely tax and license laws. Yet, to quote his mysterious verb-link, "they *underscored* the untoward nature of these controlled substances. Zealous moral crusaders and bureaucratically self-aggrandizing enforcers fueled this perception, depicting addicts as frenzied criminals and the physicians who serviced them as unscrupulous 'dope doctors.'"[258] So the gentlest early nudges did something to either *cause*, *affirm*, *reinforce*, or merely *publicize* a public concern about drugs, moral or otherwise. Then norm-enforcers who for reasons unexplained were vociferously opposed to drugs took advantage of this normative effect, and politicians seized the

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[257] *Id.* at 643.

[258] *Id.* at 631 (emphasis added).

opportunity to exploit it. As drug laws were somewhat expanded, they were not much enforced, and the public was roused by the thought of unenforced laws to demand both stronger enforcement and stronger laws. "[T]ransformative 'gentle nudges' . . . can come as just as big a surprise to lawmakers as can self-defeating 'hard shoves.'"[259] But what are the empirical bases of that and also the following statement?

> The enforcement of even these relatively mild laws, however, was sufficient to induce members of the public to revise upward their assessment of the dangerousness of drugs, a shift that predictably folded back on itself and led to increasingly tougher laws. The story of drug regulation in America is a testament to the fragility of moderation in a moral and regulatory environment constructed by social influence.[260]

Kahan notes that the spiral reversed itself on marijuana, but assures us that "[t]his development, too, fits the hard shove/gentle nudges model."[261] This is because "individuals' condemnation preferences are not infinitely adaptable," and so here, because enforcement got too rough in comparison to public moral views, a backlash occurred, a self-reinforcing wave of opposition.[262] But again, we are given no way to explain, much less to predict these events.

The story of drugs contrasts with that of alcohol. There, we are told, the reluctance of local officials to enforce new criminal laws created the public perception that these laws were illegitimate, and hence led to their repeal. Thus, to compare marijuana with alcohol, we learn that repeal of harsh laws is sometimes caused by local enforcement and sometimes caused by local nonenforcement. Sometimes laws cause people to see drugs as having no licit value; sometimes laws have no effect or backfire because the public does not independently view drugs as illicit. We get politicians intent on exploiting fears of drugs, though they may risk backlash (as with opposition to marijuana prosecutions in the 1960s and 1970s), because condemnation preferences are "not infinitely adaptable" so they backfire.

The sticky norms concept then strangely unwinds over sexual harassment. Kahan summarizes all the successes and failures of Title VII and tort law and argues that all of them are consistent with his thesis.[263] Indeed, his thesis seems to become a largely descriptive

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[259] *Id.* at 632-33.

[260] *Id.* at 633.

[261] *Id.* at 632.

[262] *Id.*

[263] *Id.* at 634-40.

one—that because of the tension between law and norms, their relationship changes cyclically or even randomly. Kahan sees sexual harassment as an area of forward steps alternating with backlashes from various parties. "The 'sticky norm' model can help to illuminate these thrusts and parries, which reflect the extent to which sexual harassment law has alternated at various points and along various dimensions between 'gentle nudges' and 'hard shoves.'"[264] Kahan says that harassment has gone from being an acceptable behavior and the source of jokes to something "unacceptable" today, and he concedes that "sexual harassment law is in part a consequence of this shift in attitudes, but it is also in part the cause of it."[265] Then he says that legal events like the $7.1 million jury award against Baker & McKenzie creates the self-fulfilling appearance of a growing consensus.[266]

For this to make sense, we must infer that this jury award, however startling it seemed at the time, is a gentle nudge, not a hard shove that creates a backlash. Thus: "[t]hrough the mechanism of social influence, individuals predictably adapt their own values to what they perceive others believe, thereby adding momentum to the antiharassment bandwagon."[267] And this adaptation has infused a new sensibility into the workplace culture precisely because vicarious liability has been imposed on corporations, and thus normal deference by employees to managers now supplies momentum to this norm. Managers are infused with the norm because of fear of huge liability—predictably $15 million per litigated claim—and thus can exploit typical worker loyalty and obedience to demand more compliance of employees. Moreover, managers, even if they resist internalizing the norm against sex harassment, will enforce *rules* against it because of their commitment to upholding their authority as rule enforcers generally.

Ultimately, or penultimately, Kahan sums up this phase of American law as a great success of law-by-accretion. Compared to the clumsy efforts of European countries to install sexual harassment law all at once, the American incremental approach, he argues, is a great success story of gentle nudges. But if we stop the story at this point, it still is a strange one for inclusion under the sticky norms thesis, because Kahan specifically notes that American law has done

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[264] *Id.* at 634-35.
[265] *Id.* at 635.
[266] *Id.*
[267] *Id.*

better precisely by virtue of stressing the civil rather over the criminal. By contrast, he laments, rape law and domestic violence law have not been so successful: though all three "aim to dislodge traditional gender norms," rape and domestic violence law are "highly afflictive, and hence highly condemnatory" criminal sanctions, and hence, he argues, they predictably generate greater resistance among decisionmakers than do milder civil damage remedies.[268] In addition, police and prosecutors, who are often the great resisters to normative change in the gender area, play no role in sexual harassment suits.

At this point, the logic of and support for the sticky norms become elusive. Kahan, who generally advocates inexpensive but efficiently condemnatory criminal sanctions, takes sexual harassment law as proof of the inefficacy of criminal law, and even suggests it thereby as a positive civil model for rape and homicide and assault law. He has not told us anything about the normative conflict over sexual harassment that would explain why it could not be regulated through some sort of criminal law—and most strikingly, he has not distinguished it in this regard from date rape law. Moreover, we are left without any formula or set of criteria by which to determine the appropriate form or occasion for gentle nudges. Though we may have thought, for example, that the jury's role in the Baker & McKenzie suit ensured that it would be a constructive "gentle nudger," we are now told that it was the very absence of a jury role in early federal harassment suits that ensured progress without populist resistance.

Ironically, Kahan then risks self-contradiction in an effort to acknowledge the political reality of widespread resistance to these legal reforms. Indeed, he describes this resistance or backlash in terms of a new outbreak of victim-blaming—a normative phenomenon if there ever was one.[269] So for example, it is now lower court judges who might most resist, to the point of nullifying legislative and Supreme Court commands. This resistance occurs even though we were just told that it was the use of bench over jury trial in early sexual harassment cases that protected plaintiffs' victories from the dangers of populist backlash. Moreover, though we were told earlier about employee deference to managerial norm-expression, we are now told that workers resist managerial sub-regulations for being too harsh.

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[268] *Id.* at 637.

[269] *Id.* at 638.

Ultimately, Kahan opts not only for a non-criminal but for a non-precedential or non-legal remedy in the form of mediation. He credits mediation with cutting out the role of resistance-prone legal actors altogether, while also avoiding the condemnatory visibility of formal legal judgments that might provoke populist backlash. Apparently, judges are prone to reject harassment claims by borrowing from the anti-reformist blame-the-woman arguments that have thwarted progress in rape and domestic violence law. This, we are admonished, is what happens when we call on judges to repudiate laws which they have internalized. But in addition, we are told, judges in low-level equitable suits, while they may resist changes in gender norms, will, if they can be persuaded to issue protective orders, enforce those orders vigorously. This is because their judicial role obligates them to demand obedience to their injunctive powers, despite the lag in their appreciating new norms about gender. Perhaps Kahan believes that some judges at bench trial will hand down progressive judgments, while a few will resist and their resistance will have regressive social effects because of precedent and publicity—he refers to the danger of conservative activist judges having available a "stockpile" of precedents.[270] But we get no analysis whatsoever about the distribution of roles, attitudes, or actions of judges. Nevertheless, Kahan assures us that successful mediations will inspire complainants to come forth and will gently enhance normative change.[271]

In regard to domestic violence, Kahan says that well-financed special interest groups forced extreme changes in the law which "decisionmakers" then refused to enforce.[272] He therefore assumes that many of these groups have far more power over legislators than over implementers in the executive and judicial branches. Because of the resistance by these implementers, Kahan suggests mostly gentle-nudge shaming for domestic abusers, such as media anti-machoismo

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[270] *Id.* at 640.

[271] *Id.* Fending off any charge of self-contradiction, Kahan then says this all differs from other areas of law because it has been patterned by shifts and countershifts. But mediation, he assures us, will "smooth out" this pattern, and his sticky norm theory explains why: Mediation will minimize opportunities for conservative judges to slow the evolution of American sexual harassment norms, and will also reduce the stockpile of unusual or anomalous cases that conservative activists exploit to tar sexual harassment law with the image of cultural extremism. And this will be especially true where the mediation results in neither compensation for the complainant nor any punishment of the wrongdoer, but only forward-looking improvement of workplace conditions.

[272] *Id.* at 627-30.

campaigns. He also believes civil and criminal contempt remedies for violating court orders are better than regular criminal sanctions. Here, contrary to the strong claim in most of his work that the law should seek to catalyze the condemnatory views of society at large, he argues that expressing the lesser "expressive wallop" of civil sanctions is a good long-term strategy, while presumably criminal penalties achieve just short-term expressive-cathartic gains.[273]

By this point, we cannot be sure whether a gentle nudge is a non-legal, a civil, or a modest criminal penalty, or any of the above. Indeed, Kahan minimizes the advent of specialized domestic violence prosecutors and, by implication, specialized rape units, asserting that because they seek to enforce outside the normative mainstream of most implementers' views, they will become "marginalized." Kahan in fact compares these to the Bureau of Alcohol, Tobacco and Firearms, but never explains in what way it has become "marginalized."[274] This is a series of questionable assertions, paying bare fealty to institutional dynamics.

It is only in discussing domestic violence that Kahan even vaguely acknowledges these institutional concerns; throughout the rest of the paper, he implicitly adopts a median-voter approach.[275] He ignores most principal-agent problems, even though the range of agent discretion is immense in criminal law, along, with paradoxically, the documented ability of the legislature to restrain agent discretion when it does so with brutal explicitness. Ultimately, all we can glean from the paper is that there may be some hypothetical way to optimize the effect of a norm or a law, and we can all find instances of pareto-inferior versions or applications of a law or a norm. In short, people will be more likely to act in accord with a law or a norm they substantially agree with.

Finally, Kahan offers his large conclusion: renounce greed; pay attention to social meaning; harness moral resentment; prefer civil to criminal; be wary of compromise.

> Those who opposed morally intrusive norms, then, should be loath to accept even relatively mild legal enforcement of them, lest a "gentle nudge" initiate an avalanche of illiberality. By the same token, citizens who support such norms should not be overly disappointed when the law only mildly condemns deviancy, given the potential

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[273] *Id.* at 630.

[274] *Id.* at 630-31.

[275] *E.g.*, Anthony Downs, *An Economic Thoery of Political Action in a Democracy*, 65 J. POL. ECON. 135 (1957).

> of a morally equivocal regime to transmute into an unequivocally denunciatory one.[276]

But he offers no sense of the relative weight or efficacy or substitutability of any of these. Rather, the tropism is toward weakening penalties—even in areas, like domestic violence, where the law can hardly be accused of being too punitive. And this then leads us to Kahan's major programmatic arguments about a more norm-driven notion of criminal sanctions.

D. SHAMING AND OTHER ALTERNATIVE SANCTIONS:

1. The Call for Alternative Sanctions

Kahan has strongly promoted alternative sanctions as a general matter, and in a few specific legal areas. The elements of his general thesis are as follows: a key and overlooked variable among sanctions is the degree to which a sanction expresses consensus moral condemnation of the act; this condemnatory message both helps the punishment win more support from the public and enhances deterrence by bringing normative pressure as well as material or physical cost to bear on a potential offender; our biggest general mistake in this regard is to rely too much on imprisonment and fines; imprisonment may send a condemnatory message but is inefficient because the physical restraint is too costly for both sides and unnecessary once we devise more symbolic ways of expressing condemnation; and fines and such other alternative measures as community service utterly fail because they do not carry any condemnatory wallop at all.[277]

In laying out this general thesis, Kahan occasionally makes qualifying concessions or assumptions. At one point he denies, or disavows, any claim that expressive meaning itself can be operative without any material sanction.[278] Indeed, he asserts—or concedes—that instrumental and expressive functions cannot be disentangled, thereby suggesting that even a supposedly purely deterrent strategy carries with it moral appraisal.[279] But he insists that certain punishments do operate through meaning expression or alteration that

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[276] Kahan, *Gentle Nudges*, *supra* note 24, at 643.

[277] Kahan, *Alternative Sanctions*, *supra* note 20, at 643.

[278] *Id.* at 600.

[279] *Id.* at 602.

distinguishes their effects from the pure costs of overt material sanctions.

The contribution of the social meaning analysis here is elusive. Most strikingly, Kahan notes the general consensus that corporal punishment is a poor idea, but he mocks the naïve explanation that it fails simply because it is "brutalizing" or humiliating to human autonomy. Kahan insists that the explanation lies elsewhere—in social meaning—and he traces our collective image of corporal punishment to the days of putting people in stocks and, worse yet, to slavery.[280] He then concludes that corporal punishment fails now because it expresses hierarchical norms at odds with our contemporary "egalitarian" norms.[281] He may be right about corporal punishment, but one wonders what else he thinks was on the mind of people who denounce corporal punishment as too debasing. He has simply identified the obvious historical associations of one form of punishment to explain social attitudes towards it, and he fails to note that the distinction between hierarchy and egalitarianism is so vague and contentless that it cannot do the work of telling us why we approve other forms of punishment. Indeed, his treatment of corporal punishment is bizarrely at odds with what he says later about community service. There he notes that some oppose community service because it allows the criminal to take on the image of the noble civic servant. His solution is to require the community service subject to wear some identifying color, or to limit community service to obviously humiliating work, like manure-shoveling.[282]

Next, Kahan hedges on the phenomenon of internalization, acknowledging that shame is an inward subjective experience and that many people condemned or deterred will not feel inwardly shamed; indeed he says that in many cases it is the recalcitrant "shamelessness" of the unrepentant that only underscores how worthy of condemnation he is.[283] But he also says that shaming penalties can deter by affecting "preference formation," "adaptation," "belief-dependence," and "goodwill"—phenomena which seem ambiguous as to changes in actual inward belief versus changes in receipt or use of information about the beliefs of others.[284]

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[280] *Id.* at 610-15.

[281] *Id.* at 612.

[282] *Id.* at 651.

[283] *Id.* at 631, 636.

[284] *Id.* at 603-05, 638-39.

Then Kahan acknowledges that shaming penalties seem inherently more feasible in close-knit village-type societies, as compared to the more anomic modern world. Nevertheless, he says that more targeted shaming penalties work within certain specific "civic and professional communities" where people remain very vigilant of each other's beliefs and status.[285] And then, on the other hand, he suggests that shaming penalties work best for a certain class of crimes for which incapacitation is not a likely alternative—a class that includes, somewhat puzzlingly, white-collar crimes, drunk-driving, and "nonviolent sexual assaults and the like."[286] Finally, in terms of evidence, he concedes that much of the support for specific sanction ideas rest on impressionistic fact, and he even allows that identifying the mechanisms by which shaming supposedly work is conceptually as well as logistically difficult.[287] This is because "it's unclear how a legislature would even start to transform the understandings that make corporal punishment express inequality, fines moral indifference, and community service public-spiritedness."[288] As historical background, Kahan has relied heavily on the failure of corporal punishment, which certainly carries expressive condemnatory force, but backfires because it violates consensus norms through its reminders of slavery and tyranny. Nevertheless, he says with some confidence that shaming penalties carry no such meaning-baggage of tyrannical hierarchy.

2. Shaming

In generally describing shaming, Kahan advocates employing it in several forms: "literal stigmatization, self-debasements, and contrition."[289] To keep his approach parsimonious, he opts mostly for direct commendatory messages, because they are cheaper and less debasing. On the other hand, he suggests that this is consistent with attaching some expressive message to otherwise non-condemnatory community service: thus, this can be publicly labeled "shameful service" and can favor, for example manure-shoveling over community gardening.[290]

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[285] *Id.* at 642.
[286] *Id.* at 648.
[287] *Id.* at 607.
[288] *Id.* at 630.
[289] *Id.* at 632-35.
[290] *Id.* at 651-52.

But to give the shaming arguments a fair chance, we can examine them in the two specific contexts in which the law-and-norms school has most fully elaborated them.

a. Shame and White Collar Crime

In a paper applying shaming sanctions to white collar crime, Kahan and Eric Posner seem to rely most heavily on a purely instrumental model of norms. They start anecdotally, with the example of Hoboken, New Jersey clamping down on the self-help on-the-street toilet behavior of local yuppies by publicly shaming the offenders through advertisements in their local papers or by requiring them to mop up their offenses.[291]

They then move to more serious matters with the example of insider trading. They conceive insider trading as morally indifferent in the public's eye, until its adventitious association with some bad event like a market crash. As Kahan & Posner narrate this association, insider trading is blamed, rightly or wrongly, for the crash, and insider traders are then shunned by others, for whom the act of shaming underscores their own appearance of moral strength; and the deviant image of insider trading then comes to serve as a deterrent. Moreover, the new norm not only deters the behavior, but deters people from believing more generally that people who engage in the behavior are desirable cooperative partners. So, by this reckoning, we start out with a change in belief about the morality of insider trading, but this change achieves a secondary effect whereby it becomes bad market-reputational strategy to associate with, and not to condemn, insider traders.[292] "Shaming destroys one's reputation, but this injures the victim not because reputation is intrinsically valuable, but because now people will not trust him, thus preventing him from obtaining future gains either through honest cooperation with others or through exploitation of others under the guise of honest cooperation."[293] Any hold-outs soon experience so-called "cognitive dissonance," which they overcome by joining the norm-obeying and deviant-shunning bandwagon.[294] People now invest in the shunning because it is good for their market reputations, and it is a worthwhile investment precisely because it is risky. That is, "guessing wrong" about the acceptance of shunning-talk is more

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[291] Kahan & Posner, *supra* note 9, at 365.

[292] *Id.* at 372.

[293] *Id.* at 370.

[294] *Id.* at 378.

costly for "public" than for private gossip, because it might be disbelieved or meet retaliation. Therefore, shunning-talk in the public sphere has a bigger payoff when one guesses right.[295]

Kahan and Posner suggest that people will avoid the offender for two reasons: (1) the offender is revealed as a bad type, who is thus likely to be unreliable in cooperative endeavors; and (2) even to the extent it might be profitable to continue to deal with the offender (because, for example, he has special skills), by ostentatiously avoiding him one can show that one belongs to the good category, and one can thereby reveal oneself to be an attractive partner for others. The resulting reputational harm can be quite severe, and yet it costs the state much less than a comparable term of imprisonment. Shaming, they assert, is a more effective economic burden than fines, because it reaches the reputational asset that fines cannot reach. It deprives the offender of his trade.[296]

So Kahan's and Posner's major point is that expressive utility changes behavior indirectly by changing meaning. Ironically, Kahan and Posner virtually concede the venerability of this insight by citing, for example, Jeremy Bentham, who said that corporal punishment "inspire[s] the public with sentiments of aversion towards it," and Sir James Stephen, who says people react to hangings with as much horror at the offense as fear of the punishment.[297] Yet Kahan and Posner invite reliance on incredibly slim evidence of success, merely asserting that their Hoboken example is a success story. More important, they assume some kind of efficiency equilibrium, namely, the success of shaming penalties will deter legislatures from over-punishing. But quite the opposite may be true, if voters and legislators are far more interested in the condemnatory effects of large penalties than in the deterrent necessity or fairness.[298]

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[295] Strangely, while Eric Posner warmly embraces this signaling approach in his book, see POSNER, *supra* note 2, Kahan has harshly denigrated it, largely on the ground that he believes it is dominated by "reciprocity theory." Dan M. Kahan, *Signaling or Reciprocating? A Response to Eric Posner's Law and Social Norms*, 36 U. RICH. L. REV. 367 (2002). The irony of Kahan's attack—he complains that signaling theory under-explains because it assumes all behavior is mostly sensitive to costs and over-explains in that it so malleable as to be tautological—is that it captures many of the problems with Kahan's own work generally.

[296] Kahan & Posner, *supra* note 9, at 369-71.

[297] *Id.* at 382. *See also* AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, THE UTILITARIANS 339 n. 181 (1961); SIR JAMES FITZJAMES STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 99 (1863).

[298] Kahan & Posner, *supra* note 9, at 365-67.

Kahan and Posner lament the passing of older, publicly dramaturgic penalties (a lament whose historical justification has recently been brilliantly skewered by Paul Mahoney,)[299] but they believe the efficacy of these penalties can be reclaimed.[300] They assert, for example, that public shaming of urinators in Hoboken has been highly effective—though (a) their evidence for this is weak, (b) the case is too trivial to mean much, and (c) whether this is white-collar crime is a matter of the most fundamental definition difficulty in the field of white collar-jurisprudence. Moreover, they themselves concede that we lack the speculative social science methodology to test this notion.

Hoboken supposedly "illustrates" how shaming penalties "gratify rather than disappoint the public demand for condemnation" and also effectively incapacitate the white-collar criminal in the way he needs to be incapacitated—his ability to defraud.[301] Kahan and Posner then address possible objections. They concede that shaming can be costly, and they acknowledge the impossibility of saying at a useful level of generality whether the costs associated with any given shaming penalty exceed the cost of imprisonment that would be necessary to achieve the same level of deterrence; they also acknowledge that the social and economic circumstances of many offenders may not be susceptible to reputation-threatening penalties.[302]

> Shaming produces highly imperfect deterrence because the injury to the offender is a function of the value of his skills, the importance of cooperation in the sale of his skills, and the willingness of other people to trust people who are shamed—which is itself a function of the proportion of bad types in the population, people's beliefs about the proportion of bad types, and the importance to these other people of establishing good reputations themselves. All these variables are outside control of the state and are not likely to be known by the state.[303]

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[299] Paul G. Mahoney, *Norms and Signals: Some Skeptical Observations*, 36 U. RICH. L. REV. 387 (2002). Mahoney shows how ill-fitted the modern notion of shame-signaling is to its supposed source in the public stigmatizing punishments of the colonial period, given that the targets of these were often so destitute and obscure that no increment of shaming could stigmatize them, and that, in the case of public executions, the crowds attracted were most likely there to provide moral support to the offender. *Id.*

[300] Kahan & Posner, *supra* note 9, at 379.

[301] *Id.* at 383.

[302] Kahan and Posner concede in a footnote that because people choose shaming when given a choice, it is more likely to under than over-deter. *Id.* at 374 n.23.

[303] *Id.* at 373.

Kahan's and Posner's conclusion from this agnosticism is that lawmakers should avoid any categorical rules and instead take a more-case-by-case approach.

Kahan and Posner also note that just as shaming by private individuals might not work if these individuals' motives are suspect (for example, if they are competitors of the shamed person) so in some circumstances the government itself may be suspected of bias. Hence

> the government should use shaming penalties only when there are no widespread doubts about the motives of government actors, and whether the underlying behavior is condemned by a broad consensus or the effect of the behavior is ambiguous enough that people will believe objections to it leveled by the government. These are empirical issues that should be studied . . . .[304]

Ultimately, Kahan and Posner adopt a middle-ground on the appropriate level of specificity. They remarkably suggest that the United States Sentencing Commission can draft implementing guidelines: the guidelines should call for formal advertisement of the conviction, with the venue and format to depend on such factors as the severity of the crime and the nature, number, and specificity of victims; and these advertisements, of course, can be combined with fines or community service.[305]

It is difficult to tell whether this is meant to be taken at face value, but as a "thought-experiment" it is decidedly feckless. It tries to derive some purchase from the extant guidelines for corporate wrongdoers,[306] though it overlooks the quite powerful shaming and humiliating devices already provided for in the general federal

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[304] *Id.* at 375.

[305] *Id.* at 373, 384.

[306] The current guidelines state: "In addition, the court may, if feasible, require the organization to create a trust find sufficient to address that expected harm, § 8B1.2, or to impose on the corporation 'community service' that is 'reasonably designed to repair the harm caused by the offense.'" United States Sentencing Guidelines § 8B1.3. (2002). Under § 8D1.3(a), "any sentence of probation shall include the condition that the organization not commit another federal, state, or local crime during the term of probation." Further, according to the Policy Statement for § 8D1.4(a):

> The court may order the organization, at its expense and in the format and media specified by the court, to publicize the nature of the offense committed, the fact of conviction, the nature of the punishment imposed, and the steps that will be taken to prevent the recurrence of similar offenses.

See, United States Sentencing Guidelines Ch. 8, Sentencing of Organizations (2002).

prosecutorial process—an institutional phenomenon that Kahan and Posner utterly ignore.[307]

It is hard to argue against a call for further research, but consider the research questions Kahan and Posner pose:

> Does the revelation of an offender's crime reduce his or her ability to obtain employment?
>
> Second, does it deter criminal behavior, or does it have little effect, or even encourage criminal behavior?
>
> Third, can the deterrent effect be predicted from whether the offender is part of the mainstream of society?
>
> Do people who are shamed drop out of society and turn to lives of crime?
>
> If shaming has a deterrent effect, is it consistent or does it vary across individuals? If the latter, are there discontinuities?
>
> Is there evidence that shaming changes people's views about the harmfulness of criminal behavior?[308]

The first question could conceivably be addressed by serious study of the employment effects of the wide range of "shaming penalties" now available in the form of state and local laws and practices, and of the important issue of past employer revelations of a person's background. The second and several others, of course, assume that we establish enough systematic shaming penalties in the first place to make a regression study possible. The third and last seem conceptually impossible out of vagueness. Thus, it is not clear what this paper has accomplished other than to assert that there is a supposedly distinct phenomenon as shaming and that its effects ought to be studied. Indeed, the list of questions makes more sense as a set of rhetorical questions implicitly arguing for the grave limits of any effort to devise penalties of this sort.[309]

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[307] For an incisive rejoinder to Kahan, by means of a review of the shaming processes already inherent in conventional white collar prosecution, see John B. Owen, *Have We No Shame?: Thoughts on Shaming, "White Collar" Criminals, and the Federal Sentencing Guidelines*, 49 AM. U. L. REV. 1047, 1053-567 (2000).

[308] Kahan & Posner, *supra* note 9, at 388.

[309] And, ironically, this re-writing of the list is in some ways what happened when one of its authors, Eric Posner, wrote separately on this subject. *See infra* notes 326-31 and accompanying text.

b. The Humanist's Understanding of Shame

The tendency of the norms school to superficially allude to the manipulation of emotion only underscores the inadequacy of any jurisprudence built at the level of generality of the concept of the social norm. It thereby tends to ignore or disrespect the complex and contested psychology of emotions—and all the issues concerning the difference between innate and "learned" emotions, or between their moral and their cognitive aspects. In this context, as an admonitory counterpoint to the norms school, Toni Massaro has brilliantly examined the complexity of shame in particular. Reviewing both psychological, sociological, and literary understandings of shame, she demonstrates how it indicates some sort of "narcissistic defeat," but also cautions that the deeper studies of shame leave us no idea whether it is a universal phenomenon or even a potentially constructive one.[310] It is a mysterious "sentry" patrolling the boundaries between one's ego and others, but it is wildly complex, with widely variant causes and behavioral responses and utilities, as well as varying interactions with other emotions, such as anger or envy or love.[311] Moreover, as she depicts it, the complexities of shame may be most vexing in the case of the most willfully deviant people—serious criminals.[312] Hence, it is especially arrogant for government to claim to exploit this emotion in criminal law.

> A similar elision of important complexities occurs if one identifies crimes that may evoke disgust in others and then enlists the fact of this disgust (that one feels it) as evidence of its moral authority (that one "ought" to feel this emotion) .... [T]he move from any emotion ... to what "ought" to trigger it must recognize the internal circularity of asserting that law can and should *shape* the cognitive content of our emotions—a social constructionist account—while simultaneously invoking an objective, moral vocabulary to feed these emotional condemnations of particular behaviors an offenders, a vocabulary that is premised in part, *on these very constricted emotions*.... [O]ur emotions are profoundly malleable; they can be, and are, molded to various ends, *ends that may or may not be normatively sound*.[313]

As Massaro argues, there is no discipline that can supply any consensus understanding of shame.[314] Shame may be biologically

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[310] *See generally* Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POL'Y & L. 645, 660 (1997).

[311] MASSARO, SHOW (SOME EMOTIONS), *supra* note 98, at 80. For a similar attack on shaming sanctions as excessive and unpredictable inflictions of harm, see Whitman, *supra*, note 15.

[312] MASSARO, SHOW (SOME EMOTIONS), *supra* note 98, at 91.

[313] *Id.* at 94-97 (emphasis in original).

[314] *Id.* at 84.

innate, but that does not mean that we have any sure way of capturing its manifestations, nor any means of predicting the outcome of any state-sponsored effort to induce it, or how, even if shame is produced, it interacts with a myriad other emotions.[315]

Massaro's deep treatment of shame can be extended to consider its power as a humanistic concept, a concept that is flattened and cheapened by borrowing from its moral capital to establish new devices for mundane criminal stigma. A key example is the essay on shame by the great literary critic Erich Heller.[316] Heller refers us to the famous last line of Kafka's *The Trial*: "'Like a dog!' he said: it was as if the shame of it must outlive him."[317] Heller points out a crucial ambiguity in German vocabulary not capturable in English. When Kafka referred to shame he used the term *scham*—which indicates an absolute condition of humanity, to be distinguished from *schande*, which is more of a situational disgrace.[318] Heller notes that the Greeks made a god of shame—*aidos*, the soul's virtue that distinguishes us from animals. For the Greeks, says Heller, shame was an aspect of the sense of awe humans felt before the holy, simultaneously an embarrassment at one's body and a sense that it masks a holy mystery within.[319] Indeed Nietzsche, the great Nineteenth Century rediscoverer of Greek sublimity, also saw shame as a mystery by which humankind feels itself a tool of a greater power. "The belly is the reason why man does not find it too easy to take himself for a god."[320] Shame for Nietzsche had a necessary social component—it had to be there for others to see—but the sense of exposure is the reminder of the mortal condition and not the condition itself. "Scham" must be felt for us to be truly human; indeed, notes Heller, "shamelessness" is a deviant condition or moral defect.[321] He laments most modern writers' classical understanding of *aidos* by trying to fit in it into particular historical or moralistic schemes.[322] The manners of shame may be the stuff of historical

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[315] *Id.* at 85, 90. For a carefule critique of shaming as a purported means of rehabilitating sexual offenders, see Kenya Jeakins, Note, *"Shaming" Probation Penalties and the Sexual Offender: A Dangerous Combination*, 23 N. ILL. U. L. REV. 81 (2002).

[316] ERICH HELLER, IN THE AGE OF PROSE: LITERARY AND PHILOSOPHICAL ESSAYS 217-33 (1984).

[317] FRANZ KAFKA, THE TRIAL 288 (1948).

[318] HELLER, *supra* note 316, at 217.

[319] *Id.* at 226.

[320] *Id.* (quoting FRIEDRICH NIETZSCHE, HUMAN, ALL-TOO-HUMAN (1986)).

[321] *Id.* at 222.

[322] *Id.* at 223-24.

detail, but shame itself, Heller argues, is the "the warrant of humaneness."[323] He concludes that

> man is capable being ashamed of almost anything that is nature about him, nature's nature, as it were, not human nature; of anything that shows him to be enslaved by laws and necessities impervious to his own will, and be it only the laws of gravitation that, conspiring against his upright dignity, brings him to fall on a slippery pavement. In such a moment he prefers not to have onlookers all around him.[324]

Bernard Williams echoes Heller in arguing that shame is essentially a matter of internal self-gazing.[325] But that does not mean it is solipsistic, nor heteronomous in the sense of a contingent concern about particular people's condemnation. Williams infers from the Greeks that for shame to operate correctly, it matters, in a subtle sense, not who the actual gazer is, but how the imagined or idealized gazer is conceived. It must be the perspective of the moral ideal to whom the persona aspires, but it must be ascribed to another human being, because shame has an irreducible social component in the sense that it reminds us that we are not morally autonomous.[326] *Aidos* is always paired with *nemesis*—the shock reaction at any violation of *aidos*; their pairing is at the heart of being human, which means having a sense of honor and also and being sensitive to violations of it.[327]

Thus, Williams importantly distinguishes shame from an emotion much more relevant to practical criminal rules—guilt. Guilt is in this sense not a condition, but a reaction to a particular act or omission—it calls out for punishment and can be redressed by reparation. The world of guilt is characterless—it involves compliance with an externally imposed law. By contrast, if shame were only at the actual discovery of one's wrongdoing by particular condemnors, then no one would have a moral *character* at all.[328]

Of course, to consider these deep philosophical and literary treatments of shame is not to deny that there may be honestly "parsimonious" uses of shame in such practical matters as economics and law. Invoking the term "shame" is harmless and potentially useful if it is stipulated to mean something limited and concrete in social behavior and does not purport to describe a deeper

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[323] *Id.* at 227.

[324] *Id.* at 229-30.

[325] BERNARD WILLIAMS, SHAME AND NECESSITY 81-82 (1993).

[326] *Id.* at 82-84.

[327] *Id.* at 78-80.

[328] *Id.* at 95.

psychological or social phenomenon that a legal program could not possibly comprehend. In his book on social norms, Eric Posner rightly notes that for purposes of policy analysis, the best we can do is be sensitive to some of the economic tradeoffs where the commodities are trust and solidarity.[329] In effect, he offers a form of behavioral economics, using simply logic and modest and clear assumptions. He assumes that the relevant commodities are reputation by itself, and also various material and non-material commodities that one obtains most cheaply through cooperation with certain other people; hence a reputation as a cooperator among those others is itself valued. Norms, in effect, are behavioral signals—you behave in a certain way, or you invest in a costly commitment to a certain behavioral norm, in order to signal that you are a worthy cooperator for a certain group. And this norm-obedience has a simple secondary mechanism—you shun someone violating the norm both because you do not trust any exchange with that individual and in order to signal your adhesion to the norm.[330]

Then there is the norm entrepreneur: Posner rightly notes that norms most often arise as historical accidents or mere statistical patterns, or in response to some wholly exogenous force.[331] Norms, he asserts, then take on some independent valence as behavioral signals of trustability. They indicate "meaning" only in this admittedly superficial sense of behavioral association, and thus can be affected or created at the level of political sloganeering and consumer advertising. Thus they carry no necessary philosophical depth, nor any necessary political implications, and they are clearly endogenous to behavior. They are different from merely value-maximizing customs or rules, but not profoundly so. For purposes of norms analysis, reputation and cooperative opportunities are the only

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[329] POSNER, *supra* note 2 at 88-111.

[330] An interesting corollary is supplied by Jon Elster, who suggests that if there is any interesting link between material sanction and the emotion of shame, it lies not in the financial cost of any penalty to the target, but rather in the cost to the sanctioner of the shaming effort and the target's resulting emotional reaction to that expenditure. Jon Elster, *Emotions and Economic Theory*, 36 J. ECON. LIT. 47, 67 (1998). Elster offers another interesting insight—that shame affects future behavior not by adding a cost to the target's utility function, but rather by so distressing that target that her discount rate vastly increases. *Id.* Note that Elster's insights simply assume that a penalty induces some negative emotion and suggests possible metrics for appreciating its effects, and so it does not fall prey to the dangers of law-and-norms shaming jurisprudence generally. It does not purport to find deeper meaning in the concept of shame, nor, does he suggest, to that lawmakers try to engineer its effects in the name of deterrence.

[331] POSNER, *supra* note 2, at 28-32.

currency you need to assume; the norms entrepreneur is motivated by sheer returns. Cooperation produces internal advantages but some externalities—which can be good (like information) or bad (discrimination). As for "social meaning," Posner suggests no more than that a law changing equilibrium directly affects behavior but also has a "hermeneutic effect"—that is, it can change the associational imagery of a certain form of behavior.[332]

The potential limited efficacy of shaming follows logically: It is a potentially cheap form of law enforcement. But as Posner notes, its drawbacks are several: it is impossible to calibrate the degree, or even the direction, of the effects of ostracism.[333] Indeed, some objects of ostracism may be lionized thereby, while others will be immune—whether by virtue of great obscurity or great fame. Some innocent relatives or associates may get uselessly ostracized, some legitimate objects of ostracism will suffer excessive reputational harms, and the ostracizers themselves may be unconcerned with these effects—they simply want to enhance their own reputations by investing some visible cost in the act of ostracism. Indeed, for this very reason, the government might stigmatize more successfully by imprisonment precisely because it is visibly costly.[334]

These sensible remarks about shaming not only are a wise admonition against intemperate or foolish policy prescriptions. They also reflect a useful kind of academic self-knowledge for legal scholars not claiming to draw on anything empirical beyond fairly common-sense facts and assumptions, and anything more methodologically innovative than the useful lessons of a behaviorally sophisticated economics and game theory.[335] But this sensible

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[332] *Id.* at 128-30.

[333] *See* Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tensions Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1 (1991).

[334] POSNER, *supra* note 2, at 106. For another analysis of the deterrent benefits and potentially criminogenic costs of shaming penalties, see Note, *Shame, Stigma, and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law*, 116 HARV L. REV. 2186 (2003).

[335] David Skeel supplements this view in offering an example of shaming punishments in a very controlled environment—corporate criminal liability—and thereby also suggests the general limitations of shaming as a device of punishment. David Skeel, *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811 (2001). Skeel uses some concrete examples of corporate shaming—CalPERS's lists of under-performing companies or certain negative articles in major financial journals—and speculates on how these communications can deter corporate misconduct. He is sensitive to the concern that because these devices often take the form of conveying objective financial information through established media, it is not clear whether they describe a distinct phenomenon of "shaming" at all. Moreover, he

approach has been far less influential than the attractions of the academic dangers it implicitly counsels against. Using the term "shame" in this transparently stipulated way can be harmless if in the service of modest instrumental analysis of behavioral incentives. The danger of the law-and-norms scholarship, however, is that it appropriates the deeper moral and philosophical capital of the phenomenon of shame in areas of crime and law fraught with deep dilemmas of morality and psychology. The area of rape is a prime example.

c. Shaming and Rape

One of the norms school's favorite targets for shaming penalties has been date rapists on campus. For one thing, the campus might be the "close-knit" community where shame might work. For another, the general under-enforcement of rape laws, caused presumably by conflicting social views on the harm of unconsented to sex and the meaning thereof, has often provoked calls for some different kind of sanction. Thus, date rape is a key part of Kahan's call for alternative sanctions and his notion of "sticky norms." He argues for shaming penalties as an optimal intermediate sanction between the theoretical—and rarely enforced—severe penalty against rape and the de facto legal tolerance of it in certain social contexts. Kahan repeatedly argues that "policies that are only weakly condemnatory can be seen as signaling that the underlying conduct is not genuinely worthy of condemnation, an inference that is likely to reinforce itself insofar as moral appraisals are shaped by social influence."[336] Thus, there is the danger that a "gentle nudge can devolve into a "sly wink."[337] At the same time, he fears that certain "hard shoves" in effect become "sly winks" because they condemn and punish so far in excess of consensus norms as to be unenforced. His own conclusion on this matter is actually an old-fashioned and much discussed one: rape law needs an intermediate sanction.

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carefully analyses the internal structural dynamics of corporations to determine whether these communications are useful, taking into account, for example, the role of indemnity and insurance for officers and directors in creating the need for distinct incremental punishments. *Id.* at 1833. He also raises questions about the motivation or incentive of shamers who are actual shareholders (such as CalPERS) and related questions about whether the costs and benefits of shaming are internalized (in the economic, not psychological sense). *Id.* at 1828.

[336] Kahan, *Gentle Nudges*, *supra*, note 24 at 624.

[337] *Id.* at 625.

Because his notion of norms carries with it no distinct means of measuring or clarifying social attitude, prosecutorial, or jury behavior, or any other factor in determining degree of enforcement, Kahan speaks in effect, at the level of general doctrine. But he does not even acknowledge that notable criminal law scholars have already quite intelligently exploited the resources of standard doctrinal analysis—including perfectly traditional moral reasoning and empirical speculation, to consider this very possibility. Thus, Donald Dripps would create two new statutes to replace rape laws: "Sexually Motivated Assault," a felony, and "Sexual Expropriation," a serious misdemeanor or minor felony.[338] These would be the two illegitimate and criminal means of procuring sex from the victim. Dripps assumes that there is a greater social interest in freedom from violence than there is in protecting sexual autonomy, and therefore a nonviolent violation of a person's sexual autonomy should not be punished as severely as a physical assault. At the same time, he believes that focusing on the action of the defendant properly respects the complainant's "property" right in bodily integrity from "theft." "Sexual expropriation" would apply when the defendant completes a sexual act over the verbal protests of the victim without purposely or knowingly putting her in fear of physical injury.[339] In a reply to Dripps, Robin West praises his imputation of autonomy and integrity to the victim; she sees this as a worthy corrective to the old patriarchal notion that a woman's sexuality actually belonged to some man, and that rape law thus protected that man's interest in the woman's chastity, and she praises the reformist gain of removing the concept of "consent" from rape law, a concept that often exculpated men who threatened violence if their victims ultimately manifested

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[338] Donald Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1799-81 (1992).

[339] Dripps then asserts that the criminal law should ignore other admittedly questionable sexual "transactions," as where, because of a "complex relationship," a woman offers sex not for her own pleasure, but rather for such consideration as fidelity, economic security, or friendship. He concedes that these "transactions" may be nonmutual and unpleasurable, but he treats the means of procuring sex in them as "legitimate." Though these latter transactions may reflect the maldistribution of bargaining power between men and women, he points out that neither the criminal law nor even the civil law of contracts attempts to cure all the maldistribution that somehow arises in our society. *Id.* at 1789-92, 1801-03. Dripps explains in a follow-up piece that by "legitimate" he meant only that these transactions are lawful, not that they are morally admirable. Donald Dripps, *More on Distinguishing Sex, Sexual Expropriation, and Sexual Assault: A Reply to Professor West*, 93 COLUM. L. REV. 1460, 1464-65 (1993).

"consent" to sex.[340] On the other hand, West argues that division of the law of rape into a violent and non-violent parts wrongly assumes that rape is only violent in the first case, where some collateral threat of violence is the means of procuring intercourse. Rather, she argues, in any case of illegitimately procured sex the act of intercourse itself is necessarily a violent physical act and the notion of a "larcenous taking" of sex becomes an inapt analogy.[341]

Kahan's norm analysis offers no more, and perhaps less. Kahan admits that he has no idea whether his proposal will work, or indeed will backfire. His analysis is self-canceling: if a gentle nudge is too gentle, it can signal that the underlying conduct is worthy of serious condemnation; if too harsh, it will turn into a morally unconvincing or unpersuasive shove and will cause disrespect for the law. At this level of generality, anecdotal examples can be found consistent with any outcome, but no part of the theory can actually be falsified.

But promise of a more elaborate and nuanced airing of the proposal for shaming penalties in date rape cases comes from Katharine Baker.[342] In one article, without relying on the patent vocabulary of social meaning or social norms, Baker deftly illustrates the complicated and sometimes paradoxical relationships among the purposes and effects of legal rules and social understandings of rape.[343] Baker attacks the premises and likely consequences of the new federal rule broadly permitting "prior offense" evidence in rape cases. She refutes its implicit premises that rape is a particularly recidivist crime and that rapists exhibit a deviant compulsive deviant mental pathology; instead, she argues that the real problem with rape in modern America is that it is a widely distributed crime committed by otherwise "normal" men.[344] Moreover, she strikingly notes, given the traditional pattern of rape prosecutions in the United States, the federal prior offense rule is likely to disproportionately target black defendants and thereby only reinforce many of the noxious

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[340] Robin West, *Legitimating the Illegitimate: A Comment on Beyond Rape*, 93 COLUM. L. REV. 1442, 1444-47 (1993).

[341] Id. at 1448-49. West also argues that to carry out the full implications of Dripps's view that sex is a commodity should require the law to grant a range of damage remedies to women whose offers of sex do not receive the full-bargained for consideration—as in many of the "complex relationships" Dripps would put outside the reach of the law. *Id.* at 1448.

[342] Baker, *Sex, Rape, and Shame*, *supra* note 9.

[343] Katherine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563 (1997) [hereinafter Baker, *Once a Rapist?*].

[344] *Id.* at 578-83.

stereotypes about race and sexuality under which pre-reform rape law operated.[345]

In fact, Baker argues, the subtler and more important "background" question on which juries need help is the motive(s) for rape, which she sees as far more social and relational than individually psychological. Avoiding the cliché that rape is all about power and control and not about sexuality, Baker notes how these factors interact in varied ways. Young men sometimes believe they are seeking legitimate sexual communication in some abstract sense, but by virtue of immaturity and prejudice they are prey to warped understandings of female emotions; thus, they are so imbued with a notion of commodified sex that even though they may recognize their behavior is wrong or even illegal, they grossly underestimate its gravity, because they associate it, at most, with theft, not rape.[346] Baker also notes how male-to-male relationships sometimes encourage rape as a device for group association and sometimes, paradoxically, in order to dominate and defeat other men.[347] Baker concludes that if lawmakers want to enhance jurors' understanding of rape, they can exploit the traditional evidence rule permitting prior act evidence as it bears on motive, and thereby avoid the dangers of the more permissive new prior act rule.[348] Thus her nuanced depiction of rape motivation produces a subtle and provocative approach to rape reform legislation.

But, as Baker's newer article turns to the toolkit of social norms and meaning to propose a new shaming penalty for acquaintance rape, the treatment of both offender psychology and legal response lose precision and resilience.

Baker's shaming proposal is premised on the notion that men seek sex as much to win peer approval for superficial masculinity as for any other motive. This notion, while highly plausible, is backed by anecdotes and popular culture facts, rather than any formal theory or data. In seeking a deeper explanation of this phenomenon Baker recurs to assertions about norms:

> [One] needs to turn to the emerging literature on norms.... Richard McAdams suggests that a preference for esteem is what explains much of the persistence of social norms. A norm develops and thrives because conforming with that norm is a means of securing the esteem of others. McAdams goes on to explain how this

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[345] *Id.* at 594-97.

[346] *Id.* at 599-606.

[347] *Id.* at 606-07.

[348] *Id.* at 612-20.

> esteem process can explain both adaptable, behavior specific norms and more abstract internalized norms. . . . The two kinds of norms often interrelate. Behavior specific rules support internalized ideals. . . . Because behavior-specific norms can support internalized norms, the internalized norm often gives social meaning to the behavior required by non-internalized norms.[349]

This distinction by McAdams provides some suppleness to the dynamics of norms: abstract, internalized norms tend to stay constant over time and place; and because internalized norms give social meaning to behavior specific norms and because behavior-specific norms can change over time and place, the meaning of certain behaviors can change over time and place. Baker applies this dynamic to date rape by describing the demonstration of masculinity as the abstract internalized norm that gives meaning to specific sexual conquests.[350]

Unfortunately, it is not clear that we have any way of measuring internalization here; instead we may essentially have a restatement of the fact that some norms are general and can be implemented by more specific ones. But Baker pushes this as a theoretical insight, and, performing what has become a ritual citation trope, she notes: "[a]s Dan Kahan reminds us, 'Actions have meanings as well as consequences.'"[351] She goes on to assert that the meaning of rape is tied up with biased gender attitudes, which, she asserts, are disproportionately prevalent among sexual criminals.[352] "The remarkably strong adherence to traditional sex-roles within the date rapist population supports this hypothesis. Gender roles explain both why date rapists fail to appreciate the importance of consent and why date rapists have such an exaggerated desire for sex." Sexually aggressive males, Baker notes, are more likely to have "rape-supportive" beliefs.[353] By contrast "pro-feminine attitudes" correlate with more sympathy toward women as rape victims—and this means those with "female sex-role orientations."[354] Just as important, Baker

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[349] *Id.* at 672 (citing McAdams, *supra* note 38, at 342). Hence one mows one's lawn to show one is good neighbor, or makes one's child wear bike helmet to show one is good parent.

[350] *Id.* at 673.

[351] *Id.* at 673 (citing Kahan, *Alternative Sanctions*, *supra* note 20, at 597).

[352] *Id.* at 674. For the notion that a proclivity to date rape is rooted in sexism, see, for example, M.P. Koss, *Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education, in* RAPE AND SEXUAL ASSAULT II 1988 (Ann Wolbert Burgess ed.,1988).

[353] Baker, *Once a Rapist?*, *supra* note 343, at 674 & n.55.

[354] *Id.* at 674.

asserts, "sex role paradigms" explain why date rapists persistently seek sex. "Date rapists see and endorse stark distinctions between the masculine and the feminine."[355]

> Proving oneself heterosexual and proving oneself masculine are one in the same act. . . . Furthermore, in a world in which the masculine is given more esteem that the feminine, men are likely to have more need to prove their gender, lest they be mistaken for someone less worthy of esteem or power.[356]

Baker quotes with approval the following assertion: "[i]ndividuals thus refrain from criminality not because they fear the threatened punishment, but because they have no desire to engage in such behavior; and they have no desire to engage in such behavior because they know it is deemed worthy of criminal punishment."[357] But it is not clear how knowing that something is worthy of punishment is related to knowledge that it is illegal, and so we cannot be sure whether we see here the internalization of a norm or the awareness of a legal rule.

In any event, in Baker's depiction, rapists show little remorse or regard for law. Perhaps inconsistently, they often offer alcohol and drugs as excuses. But, Baker notes, alcohol may operate more through the social meaning of drinking than through its biochemical effects, because studies show that placebo alcohol makes men more aroused at pornographic images.[358] Baker notes that these misogynist attitudes are especially prevalent in competitive all-male environments—such as athletic teams and fraternities—whereas more egalitarian gender attitudes are more dominant among men, for example, serving as student government leaders.[359] But, Baker argues, these attitudes are sufficiently "sticky" in this country that date rape is difficult to punish. Thus, by implication, a lower level of charge might both increase the certainty of punishment and unstick these recalcitrant social attitudes. Baker insists that "alternative sanctions will also allow communities to steer social influence. So Dan Kahan has written, '[t]he phenomenon of social influence . . . reveals that individuals' assessments of both the value and the price

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[355] *Id.* at 674-75.

[356] *Id.* at 676.

[357] *Id.* at 680 (quoting Dan Kahan & Martha Nussbaum, *Two Conceptions of Emotion in the Criminal Law*, 96 COLUM. L. REV. 269, 356 (1996)).

[358] *Id.* at 682.

[359] *Id.* at 676. *See also* J. Garrett-Gooding & R. Senter, *Attitudes and Acts of Sexual Aggression on a University Campus*, 59 SOCIOLOGICAL. INQUIRY 348, 366 (1987).

of criminal activity are endogenously related to their beliefs about the attitude and intentions of others.'"[360]

Baker seems ambivalent about the nature of the change she calls for. Is it loss of status or is it the internalization of a gender-enlightened norm? She explicitly abjures the goal of de-linking sexuality from gender and depolarizing gender in the short-run. But her stated goal is to change the meaning of date rape, in order that it be viewed with the same horror with which we now view sex with small children. Nevertheless, she argues, because of differing perceptions of truth, we need a truth that both parties can share; there can be no normative change without social discussion, and on campuses these days there is insufficient discussion.[361] It is unclear whether she means wide public discussion or a promulgation of an ethic whereby intimate sexual communication is done verbally rather than through body language.[362]

As we move to Baker's programmatic solution, the legalistic mechanics are not sketched out, so even though she claims that the cohesion of the campus can make the punishment more efficacious, she no more describes the institutional dynamics of prosecution than Kahan does for general society.[363] She merely suggests that we shift the evidentiary burden in student disciplinary proceedings. More important, Baker later makes explicit her hopes of morally reordering the conscience of offenders. She says that this is not a matter of moral decline of enforcement of a norm, "because the normative proscription on date rape had never existed."[364] So the goal here is to *invest* date rape with the moral or political capital of other norms, and Baker assumes this can be done efficaciously on a campus because of its cohesion and homogeneity, two concepts she assumes without ever defining or describing. But more broadly, her goal is also explicitly

> to change the definition of sex, so that it is understood to be not so much about intercourse, as about the communication involved in affirmative assent. We must change the definition of sex so that the failure to get affirmative assent is seen not as

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[360] Baker, *Once a Rapist?*, *supra* note 343, at 694 (citing Kahan, *supra* note 3, at 359).

[361] Though note that most campuses are awash in "awareness" events about date rape, as a virtual obligation of dormitory life.

[362] *Id.* at 687 (discussing the famous—or infamous—Antioch College requirement of express consent to sex).

[363] *Id.* at 698-99, 710.

[364] *Id.* at 707.

> an alternative to consensual sex, but instead something completely other, like sex with a four year old.[365]

Thus, the shame sanction will cause men to regulate themselves, and it will borrow from John Braithwaite the idea that "Shame is a route to freely chosen compliance."[366] It will accomplish this by having the perpetrator stay in campus, wear a shaming armband, and apologize in class; it will also use college newspaper announcements to explicitly link the crime to fraternities or athletic teams with which the offender is associated—a sort of corporate liability—and the offender himself will be banned form extracurricular activity and alcohol use.[367]

> For this period of time he would be stripped of all of the traditional means of acquiring masculine esteem. After completing his sentence, however, his penance would be over and he should be allowed to re-integrate himself into the community. . . . The perpetrator would not have to admit criminal wrongdoing, but he would have to admit wrongdoing. The class would not be allowed to jeer. . . . The rapist should have to acknowledge publicly that his behavior was morally wrong and worthy of scorn, He might also be asked to deliver to his victim, every day or every week, reparations of some kind.[368]

If not only the individual, but his entire peer group, risks public humiliation, there might soon be strong peer pressure to avoid this risky behavior. Baker concludes:

> By using demeaning sanctions, like public display, communities can destabilize the link between sexual conquest and masculinity instead of enhancing the perpetrator's masculinity, taking sex without consent could result in an emasculation of the perpetrator. In addition, stopping short of rape could suggest that one's masculinity and the status of one's peer group were important enough to forego the risk of a demeaning display. Instead of being seen as a "wimp," the man who does not join in the sexual exploits could be seen as the man more capable of valuing masculinity, honor, and peer affiliation.[369]

But to make the "emasculation" more morally efficacious, we are reassured that the offender is not to be forced to wear women's clothing, since that would "complicate the signal." This is seen to be an example of, in Lessig's terms, ambiguation.[370] So we cannot "curb date rape simply by telling people that date rape is "real rape."

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[365] *Id.* at 697.

[366] *Id.* at 698 (quoting JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 10 (1989)).

[367] *Id.* at 698.

[368] *Id.* at 699-70.

[369] *Id.* at 701.

[370] *See* Lessig, *supra* note 3, at 968-72 (dueling example).

> Emasculation must therefore be achieved more indirectly . . . by temporarily prohibiting men from displaying the masculine qualities of independence, pride, control and righteousness and requiring them to acknowledge publicly their dependence, humility, limitation and wrongdoing. The key is to make date rapists feel sorry for what they did and make others uninterested in emulating their behavior.[371]

And Baker confidently concludes that the effect will be to "change the social meaning of rape" and to ensure that the changed meaning is internalized.[372]

Baker acknowledges Massaro's criticisms of any superficial legal exploitation of shame, and concedes the risk of "dehumanization." But she finesses these criticisms by insisting that it does not dehumanize to impugn someone's masculinity, because humanity should not be gendered anyway.[373] Thus, the shaming sanction's purpose is to morally reorder the man's humanity and, in any event, it is not dehumanizing because any loss of privacy to him simply matches the loss he imposes on the victim. This may seem a very roughly compensatory or retributive model, but Baker simply claims that it is virtually *rehabilitative* because the man's loss of privacy will necessarily cause him to empathize with the woman's. In an unusual utilitarian balancing, Baker argues that women must yield their privacy when they complain, but men must suffer some compensatory loss of their own privacy. Baker even extends this implicit balancing argument to say that if the punishment seems "base" or "bestial," it is thereby a perfect match for the nature of the crime.[374]

Baker's article reveals the problems that the norms approach poses for analyses of the interaction between law and social behavior. The norms approach purports to capture the moral culture in a particular social context, but it relies on neither psychology nor sociology in any systematic way, nor can it offer any economic metric for calibrating punishment. It purports to capture the meaning of behavior and sanctions but can do so only at a level of social stereotype and speculation. It claims pragmatism by offering what seem to be highly specific, carefully honed proposals, but it is vague and overly general about the operational dynamics of the shaming sanctions, and yet jarringly specific in describing particulars without sufficient institutional context.

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[371] Baker, *Sex, Rape and Shame*, *supra* note 9, at 705.

[372] *Id.* at 706.

[373] *Id.* at 706, 710-11.

[374] *Id.* at 713.

An argument for blunt shaming might be a provocative idea if offered as a deliberate shock therapy, with no claim of its likely effect other than the possibility of jarringly new deterrent value that cannot be measured, and with meaning-making value that cannot be assessed. An essay into the value of shame over sexual aggression could proceed from highly particularized studies of sexual and social relations, and could draw from the well-established, if under-enforced, penalties for date rape now extant to provide for grounded speculation as to how shame might operate. In addition, since the supposed attractiveness of shaming penalties is the inefficacy of other penalties, speculation raising the question of shaming might provoke useful analysis of why the other penalties are not working. Most obviously, in this context, the almost complete absence of formal criminal prosecutions of college males is oddly paralleled by the almost complete inefficacy of internal administrative sanctions.

Is it possible that the right step is to give up any pretense that college officials can police date rape, and instead move the system back toward inviting the police to intervene? Surely prosecutors will resist these cases and surely reporting might be reduced further. But it is also possible that targeted use of true criminal sanctions will serve the meaning-changing goals of the shaming penalties very well. Perhaps the real problem of the social meaning of date rape is that it has come to be viewed as a matter of college discipline, not criminal law. Whatever the right solution to date rape on campus, the conceptual devices and vocabularies of social norms and shaming penalties have proved as much a constraint on as a generator of useful approaches to the problem. As Massaro rightly asks,

> [W]hat is the proper role of the government . . . in shaping social norms and thus our emotional makeups through criminal and civil laws that define what is, or should be, shameful, embarrassing, outrageous, or disgusting? What shape should this governmental intervention take? Should it be punitive? Educational? Therapeutic? Redistributive?[375]

IV. DETERRENCE AND EXPRESSION IN LEGAL AND POLITICAL DISCOURSE

In recent work Kahan has tried to offer a wider jurisprudential perspective on how the experience of living in a norm-filled world puts us in tension with other values. And, for Kahan, it is a strangely roiling experience indeed. His most expansive effort in this regard is

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[375] MASSARO, SHOW (SOME) EMOTIONS, *supra* note 98, at 92.

his essay *The Secret Ambition of Deterrence*.[376] The gist of the paper is that people are animated in their legal and political views mostly by normative appraisals of others' behavior, but that there is a traditional American ban on public moralizing. Hence, people must find a value-neutral medium of discourse and must hope they can align that discourse with their moral views. And, Kahan asserts, in the area of crime, that value-neutral discourse is deterrence.[377]

This new phase of norms scholarship curiously confirms the risky plasticity of the concept of social norms. In this new phase, the notion of a norm slides from an arguably concrete behavioral standard to a an almost free-floating clusters of notions of "belief" and "value." It thereby leads norms commentary to implicitly claim status not just as a tool of social analysis, but as a new discipline of political science or political economy, or indeed even a new form of cultural anthropology or cultural studies. And the Secret Ambition essay thereby illustrates the tropism of this new stage of norms scholarship to so heavily invest in the norm-rooted nature of political life as to devour and render irrelevant other social phenomena.

It is only at the very end of the paper that its pragmatic purpose becomes fully evident. Kahan aims at advising "liberals" about how to conduct public discourse about crime. That is, he offers political/rhetorical advice as to when it is efficacious to use normative or expressive language about values and when it is efficacious to make only instrumental arguments. But at the same time, Kahan proudly claims that the discovery that punishment is fraught with expressive meaning and moral judgment "supplies a powerful tool for making sense of common intuitions about criminal law."[378] For example, he notes, rape is considered more serious than aggravated assault, fines are considered inappropriate punishments, and theft is wrongful but competition is not.[379] Kahan notes that criminal trials and legislative debates about crime are arenas for competition over norms and values, though he does not cite Thurman Arnold's famous essays on the cultural role of litigation in America that elaborated this theme seventy years ago.[380] In any event,

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[376] Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999) [hereinafter Kahan, *Secret Ambition*].

[377] *Id.* at 417.

[378] *Id.* at 420.

[379] *Id.*

[380] THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT 130-48 (1935) (making the same point).

Kahan's treatment lacks a sufficiently distinct definition of "meaning" here to differentiate it from some common-sense understanding about the types of harms society seeks to insure against through criminal laws.

Kahan's purported discovery of a suppressed moralizing under the veneer of deterrence discourse may find proof in obvious facts of political life which require no such grand theory. But as an empirical matter, it is hard to find any evidence of this ban on public moralizing that Kahan asserts is a core American cultural value. Moreover, if he means to impute this ban solely to the faction he calls liberals, we have no coherent definition of liberalism to use here. Kahan may be referring to "philosophical liberalism" and, in some deep philosophical sense, American liberalism may indeed scorn assertions of deontological value.[381] Yet, even on this score, the supporting citations hardly prove his point. Thus, says Kahan, John Rawls urges that in civic debate we should not appeal to "comprehensive religious and philosophical doctrines" or claims of "the whole truth, but rather to explain our actions reasonably in a manner consistent with freedom and equality." Other liberal thinkers ask that we refrain from claiming "privileged insight into the moral universe" but rather appeal to principles that can be shared by fellow citizens of "diverse moral persuasions."[382] These positions hardly amount to a ban on normative expression or value claiming in civic debate. But in any event, Kahan elides several levels of generality and assumes that this deep philosophical aversion acts itself out at the level of popular politics.

Moreover, even at the conceptual level, Kahan's binary distinction is between something he alternately calls expressivism and moralizing on the one hand, and deterrence on the other. This division of categories overlooks important complexities, especially on the deterrence side, where deterrence seems to do the work of instrumentalism in general, and thereby ignores the complex possible forms of utilitarianism. Most relevantly, this division forces an

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[381] *Id.* at 478 (citing John Rawls, *The Idea of Public Reason*, in POLITICAL LIBERALISM 214-15 (1993); BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 10 (Yale Univ. Press 1980); AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 55 (1996)).

[382] Rawls, *supra* note 381, at 224-25.

artificial distinction between instrumental and noninstrumental motivations of punishment, a distinction crucial to his thesis.[383]

Kahan complains that deterrence requires an impossible valuation of harm (he does not consider the standard economic notion that preferences are supposed to be fixed). Deterrence, he says, requires a consequentialist theory of value, but, he laments, nothing intrinsic to deterrence supplies one, and if expressivism were to supply particular valuations, deterrence would be powerless to object. Thus, Kahan worries that people may want to punish abusive husbands more than murderous spouses, even though the latter is a more efficient use of resources.[384] Finally, he makes a strangely sentimental binary distinction about the emotional content of these two types of discourse. He assumes that deterrence talk is cool and pacific while expressivism, merely by offering contestable value judgments, is harshly condemnatory toward someone. Yet he ignores the perfectly obvious possibility that deterrence talk can obviously be explicitly brutal in its honest treatment of individuals as means to social ends, while much legal "expression" is cloyingly "humanistic" in its claim to transcend moral judgment or political hierarchy.[385]

Sometimes Kahan acknowledges this problem of slippage between laws expressing values and enforcing norms. He argues for the partly independent role of expressivism by showing that moral judgment and expression are necessary components of deterrence and retributivism. But no one would really disagree with this assertion, and it is a huge non-sequitur to jump from this to the conclusion that active moralistic expression must be employed to serve these other ends. Thus, it is precisely in noting the inadequacy of deterrence discourse that Kahan says that it presupposes an external theory of value it cannot directly supply. When we differentiate manslaughter claims, how do we value the psychic gains of different killers? "Unless we know whether and how much we disvalue a particular species of conduct, we can't determine whether the cost of deterring any particular amount of it is worth paying."[386] But in so framing the issue, Kahan casts doubt on the strength of his thesis.

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[383] *See* Kyron Huigens, *Street Crime, Corporate Crime, and Theories of Punishment: A Response to Brown*, 37 WAKE FOREST L. R. 1, 9 (2002) (criticizing norms theory for false choice between retribution and deterrence, which are "functions of punishment, not theories of punishment").

[384] Kahan, *Secret Ambition*, *supra* note 376, at 426-27.

[385] *See* GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW 196-17 (2000) (discussing the risks of sentimentalism in law-and-humanities scholarship).

[386] Kahan, *Secret Ambition*, *supra* note 376, at 427.

The positive part of the paper tries to be a sort of historical sociology of American discourse about criminal punishment, and it purports to discover deep divisions and groupings built around normative meaning. In fact, this classification tends to devolve into a conflict between contemporary conservatism versus contemporary liberalism in the crudest form, both reflected in obvious pop-politics journalistic discourse, and the former, though not the latter, finding a historical antecedent—Southern white honor culture. Also, Kahan claims to have discovered that people do not really believe their deterrence arguments, but use them because of the ban on public moralizing. Now, it is trivially true that most people's posturing about the death penalty opportunistically and hypocritically exploits instrumental arguments when available and discards them when inconvenient.[387] But the motive for this is precisely the economy of posturing. Thus, liberal politicians, quite transparently, undergo death penalty conversions by announcing that whatever the statistics on marginal deterrence might say, they *believe* the death penalty deters.[388] The relationship between deterrence and value speech in this typical delivery is far more transparent than Kahan suggests.

Kahan's basic historical text is Holmes's treatment of self-defense doctrine, and, more generally, the peculiar Nineteenth-Century American rule which refuses to require retreat from by a person facing a deadly attack even when that avenue is reasonably possible.[389] Various state court judges before and after Holmes asserted honor as a sufficient moral justification for refusal to retreat. Holmes may have acknowledged this value privately, but in his famous *Brown* opinion he merely alludes to the belief in honor as an incurable social fact, and so it is arguably the futility of deterring the honor-motivated attacked person from deadly response that causes Holmes to side with the then-traditional American rule.[390]

In fact, the famous Missouri court opinion representing the traditional rule speaks of having to balance rights recognized in law;[391] hence Kahan does not tell us how to distinguish "normative expression" from common law or constitutional recognition of rights.

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[387] Kahan makes this seem like a remarkable discovery. *Id.* at 437.

[388] Robert Weisberg, *The New York Statute as Cultural Document: Seeking the Morally Optimal Death Penalty*, 44 Buff. L. Rev. 283, 283-85 (1996).

[389] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 46 (Dover 1991)(1881), discussed in Kahan, *Secret Ambition*, *supra* note 376, at 429-435.

[390] Brown v. United States, 256 U.S. 335, 343 (1921).

[391] State v. Bartlett, 71 S.W. 148, 151-52 (Mo. 1902).

But Kahan needs to have Holmes acting strategically, suppressing his normative beliefs, because he believes Holmes thereby intended and achieved a pacification of an expressive war over criminal justice. Holmes, Kahan suggests, may have privately believed that honor truly did counsel a proud man not to retreat.[392] On the other hand, he may have recognized that even if excusable fear, not pride, were the salient part of human nature in the case of self-defense, the no-retreat rule was not the only logical consequence.[393] Either way, Holmes's stated deterrence rationale seems disingenuous, but it is strategically so, because the language of deterrence avoids invoking the injunction against moralizing, and "Holmes's authoritative reconceptualization of the rule strips it of the evocative vitality that it needs to underwrite expressive conflict."[394] Indeed, Kahan says that Southern and Western forces were obviously pleased by the rule, even if they found it morally tepid for lack of expressivism, Easterners were satisfied that even if the no-duty-to-retreat rule was affirmed, Holmes at least did not affirmatively endorse Southern values.

This interpretation is too ambiguous to be useful or verified. Does Kahan mean that a duty-to-retreat rule would have led to a roiling national debate? Did Holmes's opinion on federal criminal law affect all state court opinions—and if so, in which regions? How, given the supposed effect of the Holmes opinion, did the retreat rule issue revive itself in modern domestic violence cases? Is it because feminists learned to exploit the Holmesian utilitarianism? Kahan actually concedes that his explanation may not be the right one, but insists "that this is one of the questions that we ought to ask if we are trying to evaluate Holmes's argument."[395] But, what evidence could we possibly find for his historical claim? And what does Kahan think is the basis of the "liberal" expansion of self-defense rights for battered women?

Thus, Kahan argues that liberalism promotes enough deterrence talk to suppress *kulturekampf*'s:

> Most of the time, however, politicians and ordinary citizens alike blunt the sharp edges of their expressive commitments with the softer idiom of deterrence, the logic of which doesn't assault either sides' fundamental commitments, at least not

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[392] Kahan, *Secret Ambition*, *supra* note 376, at 434.

[393] *Id.* at 430-31.

[394] *Id.* at 433-34.

[395] *Id.* at 435.

> frontally . . . What deterrence rhetoric helps each side avoid disclosing . . . are their culturally imperialistic ambitions.[396]

But elsewhere Kahan finds *kulturekampf*'s breaking out with regularity. Most notably, he asserts that the death penalty issue is likely to be unusually susceptible to the risk of expressive conflict overwhelming more civil deterrence debate, though he also says this only happens episodically. Here his example is the Willie Horton issue in the 1988 Presidential election, where, he says, both sides used "excruciatingly judgmental expression."[397]

It is not clear that this is even mundanely true because, in fact, in the 1988 race, the Democrats *did not* respond in expressive kind; they tried to dodge the issue altogether. But even if they had fought an expressive battle, Kahan's historical interpretation does not tell us why the conflict happened in 1988 and not at other times. The Horton affair, however, does provide Kahan with an opportunity to say something about discourse strategy; indeed he actually faults Dukakis for not being as expressively vitriolic as he could be, thereby suggesting that sometimes fire must be fought with fire. But, again, it is not clear when this is true, since the only cited failure by the Democrats was one overly tepid Dukakis remark itself. Nevertheless, for Kahan, the Willie Horton issue "constructed a conflict between two fundamentally opposed cultural styles. Authoritarianism clashed with egalitarianism, righteousness with tolerance, southernness and westernness with easternness, compassion for victims of crime with compassion for victims of social deprivation."[398] This statement manages to be both obvious and false. "Egalitarianism" is not a meaningful term here, nor is the notion of Willie Horton as victim, since those appalled by the advertisement were far more concerned with its wider denunciatory implications for black males than for its treatment of one foul criminal. So this turned out to be a brutal war of expression that Dukakis would not fight. But at that point in the debate, says Kahan, "deterrence talk was clearly not up to the task of returning the expressive genie to its bottle."[399]

> At the same time, the dynamics that generated the Willie Horton dispute suggest that the heat of the death penalty debate is bound to reach this temperature periodically, notwithstanding the cooling potential of deterrence. *Most* of us don't want to talk in the way that Americans talked to each other during the 1988 presidential campaign.

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[396] *Id.* at 459-60.

[397] *Id.* at 449-51.

[398] *Id.* at 450.

[399] *Id.*

> But *some* of us do want to talk this way, at least when there's some obvious political gain to be had in doing so.[400]

What happened in the wake of Willie Horton? The death penalty did not figure prominently in the next two presidential debates, not because deterrence talk suppressed expressive conflict, but because Democratic hypocrisy took the issue off the table altogether. In any event, there is no evidence whatsoever that American politicians either distinguish expression from deterrence or that they have any fear of bold normative appraisal in their discourse.

A. GUNS, HATE, AND DETERRENCE

In discussing two other key examples, gun control and hate crimes, Kahan asserts that in both cases, opponents try a mix of arguments. He sees the debating sides on these issues opting for expressivism, finding things getting overheated, and then moving to deterrence. In doing so, Kahan confounds such diffuse but different things as "meaning," "cultural style," "identity," and "value."

Guns turn out to be an equivocal case.[401] In Kahan's view, both sides in the gun control debate try to argue instrumentally, but do not say all they think, since, in his view, both sides are engaged in a stealth culture war under the noise of gun-policy arguments. "The protagonists in the gun control debate, like those in the death penalty debate, are fighting to control the expressive capital of the law. Deterrence rhetoric conceals, but barely contains, each side's illiberal ambition to proclaim its cultural and moral ascendancy through the law."[402] This view permits Kahan to descant on the rather obvious journalism-level cultural politics of Marlboro men vs. San Francisco feminist liberals. Again, he makes an almost self-canceling concession—in this instance, that there are other cultural styles that attach social meaning to gun, such as inner city gun owners. But he nevertheless insists that these are the dominant cultural styles. Oddly, Kahan asserts that gun-owners and their allies have repelled all but the most trivial forms of gun control in large measure because the ambitions of the gun-controllers are perceived as essentially expressive. Thus he suggests that gun-controllers here would find it efficacious as an offensive strategy to urge deterrence arguments, especially since the majority of the public actually sides with them,

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[400] *Id.*

[401] *Id.* at 451-58.

[402] *Id.* at 451.

and he hints that the gun-owners have exploited the political economy of fund-raising and lobbying intensity to exploit this advantage. And because it is their cultural identities at stake,

> [t]his "action-reaction" dynamic makes expressive arguments for gun control inexpedient as well as illiberal. To dampen the intensity of opposition, it is essential to assure gun owners that control is *not* motivated by disgust for their cultural identities. Indeed, moderate advocates of control implore their allies to disavow strident, ideologically charged rhetoric. This strategic motivation, along with the norm against public moralizing, helps to explain the prevalence of deterrence arguments in the gun control debate.[403]

At this juncture it has become very difficult to distinguish among Kahan's positive, normative, and strategic arguments.

Kahan assumes that what he calls liberalism can be defined in large part by its commitment to the principle that harm is a prerequisite for regulation. But he never explains why we should assume this or whether contemporary progressives, as opposed to disembodied, abstracted liberals, must logically subscribe to the harm principle themselves, or indeed why "values" cannot include harm in the broader sense. Nor does Kahan link his treatment of the gun issue either to the distinction between libertarianism and liberalism, or to the whole history of the Second Amendment.

Kahan's argument is more explicitly self-canceling on the subject of hate crimes, where he appears to find both pro- and con-arguments alternating between expressive and deterrent justifications.[404] He assures us that questions of social meaning recur in the debate over hate crimes: "[w]ork in social psychology, for example, suggests that individuals who hold homophobic views tend to belong to communities that assign status according to traditional hierarchical gender norms."[405] Meanwhile, "[i]ndividuals who belong to communities that prize egalitarian norms" tend to be tolerant and to express their views so as "to affirm their membership within these communities." And these individuals find hate crimes laws useful expressive mechanisms that send the message that the offender was wrong to see the victim as lower in worth by virtue of his group commitments.[406] In this way, they assure the victim and those who share his commitments that they *are* full members of society. Then, eliding a subgroup with the recurrent vague concept

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[403] *Id.* at 462.

[404] *Id.* at 465-72.

[405] *Id.* at 473.

[406] *Id.*

of "community," Kahan says that these laws "affirm the larger community's commitment to the value of equality."[407] He concedes that the laws might thereby be instrumental in promoting tolerance and respect, but he insists that they also have "inherent value."[408] At the same time, asserts Kahan, opponents of hate crime legislation read in the laws a different meaning—an expressive devaluation of the categories of people unprotected by the laws.

Kahan's penultimate argument seems to be to that it is salutary for us all to continue complying with the alleged ban on public moralizing, because it offers a kind of noble truce in the culture wars. He encourages us to disavow privileged positions and seek the middle ground of uncontested principles. But this notion of a middle ground bears no logical relation to the proliferation of identity movements spawned by modern progressive politics. At best, Kahan roots it to practices of judicial restraint, but then he ignores the legislative side of politics and lawmaking. He believes the ban on moralizing is designed to promote popular acceptance of law, and to undergird autonomy. "Expressive arguments overtly appeal to values—from hierarchical conceptions of honor to contested conceptions of equality, from individualism to civic solidarity—that belong only to particular moral visions and cultural styles."[409] And so the infusion of moral value into political debate "aim[s] at the exaltation of one subcommunity's moral view and the disparagement of another's."[410] Thus, he concludes, the law should get out of the business of sending messages if it wants to stop igniting zealotry. This is because to affirm a contested value is to show contempt for opponents. More specifically, "[c]onsequentialist arguments are likely to strike citizens as imperialistic about conceptions of the good only when those arguments clearly specify the account of the good that they are trying to maximize."[411] In short, the more transparent the law is about the good it seeks to enhance, the more destructive the law is.

Kahan acknowledges that liberals often are not advocates of deterrence,[412] yet he strongly, if inconsistently, urges liberals to

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[407] *Id.* at 465.

[408] *Id.* at 466.

[409] *Id.* at 480.

[410] *Id.*

[411] *Id.* at 483.

[412] Indeed, Kahan cites two eminent liberals: JOEL FEINBERG, DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 95-251 (1970), and Jean Hampton, *The*

choose deterrence to suppress conflict—except when he rethinks the other approach is better. He says liberals who "disparage deterrence are guilty of indefensible recklessness."[413] And he proffers one alternative device to suppress zealotry—"voluntarism"—which, he laments, works less well. This is a curious argument, since if he were to elaborate his definition of voluntarism, it would not likely turn out to be inconsistent with deterrence.

Ultimately, Kahan recommends deterrence-discourse as a strategy because expressive arguments, by stressing contested values, attack individual autonomy by humiliating the cultural identities of opponents. "Like the decision of a judge to invoke formal grounds rather than moral ones, the decision of a citizen to rely on deterrence rather than on expressive arguments shows respect for her cultural adversaries."[414] But, in Kahan's view, at other unpredictable times, liberals make a big mistake by using deterrence discourse, because they thereby yield the field to their enemies.[415] He tries to connect legal change with advertising and pop culture as forces in norm changing. "Because it is commonly understood to express community values, criminal law in particular is an important cue about what others believe."[416] And by trying (do they?) to strip law of its progressive potential, progressives squander an opportunity to overthrow bad norms.

> Absent normal sanctions of public moralizing—a system that we don't have and couldn't have under the First Amendment—this collective action problem can be solved only by social norms backed up by the informal sanctions of personal guilt and

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Retributive Idea, in JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 135 (1988).

[413] Kahan, *Secret Ambition*, *supra* note 376, at 485.

[414] *Id.* at 481.

[415] *Id.* at 487. As Massaro notes:

> [t]his description of our inner emotional state, which assumes that unsuccessfully repressed powerful emotions will find their outlet through other, less controllable means if they aren''t released properly in formal rituals, hardly derives from the social norm theory accounts of status-seeking, rational-choice-executing citizens that is the premise of the new approach to deterrence of crime. Rather, this psychological description of out submerged, unresolved, and ill-understood emotional conflicts signals [a]. . . subtle shift . . . to a Freudian frame . . . ." She sardonically notes that this Freudian account makes little sense where the "analysand" is actually the people in general, who are not present at the analytic session and may not know or care very much at all about the courtroom ritual designed to release their outrage.

MASSARO, SHOW (SOME) EMOTION, *supra* note 98, at 99-100.

[416] Kahan, *Secret Ambition*, *supra* note 376, at 487.

> public scorn . . . Expressive zealots . . . invariably breach the expressive peace and force more moderate citizens to take up arms as well.[417]

Kahan gives the example of Maryland Judge Cahill, who notoriously gave a wrist-slap sentence to a wife-killer. He offers Cahill as a prime example of an expressor whose refusal to bury his moralism in deterrence discourse flushed him out and led to his expulsion from office. But consider the key infamous statement in the Cahill matter: "I seriously wonder how many men married five, four years . . . would have had the strength to walk away without inflicting some corporal punishment."[418] If anything, this sounds just like the moralism-avoiding, instrumental concession to practicality that Kahan had earlier credited to Holmes.

In seeking a final global perspective, Kahan concedes that all sides can play the norm manipulation game, and that there is no guarantee of who will win. Thus, the liberal defense of expressive détente risks enhancing the status quo, since hierarchical norms are now still predominate.[419] For Kahan, this means, for example, that political support for the death penalty, as well as occasional judicial mitigation for homophobic killers, can express "hierarchical and individualistic" norms. Thus, because "[public] reason" is a "public good," at some times undetermined "accepting the expressive detente urged by liberalism would make progressives complicit in the life of hierarchical and individualistic norms that are in fact ripe for annihilation."[420] Putting aside whether there is any coherence to conceiving the moral enemy of liberalism as something called "hierarchy and individualism," we are left with no measure of where and when to break this so-called détente.

Then Kahan shifts to a compromising flexibility and caution: we need a "fairly fine-grained and contextual understanding of how citizens perceive different styles of argument."[421] And he now teases us into thinking that he can supply it. Thus, in his view, here, as in the case of Willie Horton, conservatives fight a bitter expressive war, and liberals must fight back. Moreover, he believes, liberals should sometimes welcome the expressive moralism of the other side, because it sometimes exposes the ugliness of their views. Thus, his

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[417] *Id.* at 489.

[418] *Id.* at 490 (quoting *She Strays, He Shoots, Judge Winks*, N.Y. TIMES, Oct. 22, 1994, at A22).

[419] Kahan, *Secret Ambition*, *supra* note 376, at 488.

[420] *Id.* at 492.

[421] *Id.* at 483.

infamous Judge Cahill, who also excused a gay-basher from any prison sentence by expressing sympathy with the killer's prejudices, did us a useful deed. This is because had Judge Cahill instead tried a "deterrent" argument, arguing this as some sort of emotional disturbance excuse, liberals would have had to flush out his moralism in order to achieve the type of public denunciation the judge suffered.[422]

Kahan finally purports to offer us a rhetorical scheme or menu to help us choose the most efficacious form of discourse for the circumstances. Actually, he offers two separate menus.[423] As a very general matter, he argues that liberals should mostly rely on what he calls deterrence arguments, suggesting that deterrence discourse should appeal to three groups: (1) ordinary citizens who hold views but not passionately;[424] (2) officials and opinion leaders who are committed to cleansing public debate of moralizing as a matter of principle; and (3) strategically sophisticated and emotionally disciplined leaders, who will be attracted to the conflict-suppressive value of deterrence arguments.

Then he offers a more calibrated-looking menu. He ultimately asks whether the "discourse management" of deterrence is good or bad. "Does it cleanse public debate of excessive zealotry? Or contaminate it with hypocrisy? Does it facilitate convergence of citizens of diverse cultural identities?"[425] He finds no sure answer, but urges us to "pragmatically adapt our style of talk to the nature of the issue at hand, although even this strategy tends to defeat itself when self-consciously pursued."[426]

First, where we are motivated by commitment to good norms that already enjoy political consensus or by bad norms that are far outside the mainstream—as with "extreme fighting"—we should use deterrence rhetoric, since victory is likely, and there is no point in "piling on" with excessive expressive denunciation of our opponents.

Second, Kahan addresses instances where we are motivated by opposition to bad ("hierarchical or individualistic") norms that are currently efficacious, but whose further applications could be

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[422] *Id.* at 467, 490.

[423] *Id.* at 474-75.

[424] "For them, the value of revealing their expressive allegiances in public is smaller than the gains of complying with the liberal social norm against contentious public moralizing." *Id.*

[425] *Id.* at 477.

[426] *Id.*

thwarted by strong opposition. In these instances, he recommends that we should speak expressively to achieve normative change.

Finally, where we face bad norms of overwhelming social valence, we should revert to deterrence to as not to risk overt defeat on our normative position—and wait to fight another day.

Kahan actually concedes that his pragmatic strategies unrealistically assume that participants in policy debates enjoy a sophisticated and complete understanding of the norm-shaping styles of different types of discourse they have available to deploy and that participants can coordinate and control their tactical choices. Yet given the way the strategies are laid out, it is hard to tell when you are in one category or another. Finally, he concedes that we face an old-fashioned rationale expectations problem: however you contrive your appearance to your opponents, they will psych out your strategy and discount the very appearance you present.

So Kahan's thesis all turns back on itself:

> The secret ambition of deterrence is thus only a slice of an insoluble discourse dilemma. The liberal defense of deterrence as public reason respects individual dignity and mutes counterproductive political conflict, but also subsidizes bad social norms by shielding them from critical appraisal. The antiliberal critique of deterrence liberates the norm-reforming potential of expressive condemnation, but gratuitously stigmatizes harmless deviancy and risks provoking reactionary backlashes. A pragmatic strategy, which shifts between deterrence and expressive condemnation, promises to combine the best elements of both approaches and to avoid the worst, but is impossible to execute as a practical matter.[427]

So what theory is best for managing public discourse? There simply is no answer, at least when the question is posed this globally.[428]

The *Secret Ambition* paper portrays strangely but tellingly the world that Kahan conceives. It is a rather binary one, where rational, instrumental understanding of harm is at war with "cultural" values that seem inherent but unexplained as psychological or attitudinal preferences in people. He waffles between recommending on the one hand, emphasis on otherwise discredited liberal discourse that suppresses value expression in the name of a denatured emphasis on social science, and, on the other hand, urging honest, indeed purgative social dialog on these preferences. That this is the world he depicts is readily clarified by a follow-up paper which makes this binary view even more explicit.

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[427] *Id.* at 500.

[428] For a fervent critique of efforts to devise optimal mixes of punishment in the absence of any coherent theory of punishment, see Huigens, *supra* note 383, at 4.

B. BACK TO THE GUN DEBATES

This paper, by Donald Braman and Dan Kahan, begins by reviewing the statistical debates about the efficacy of gun laws and concludes that the debate is an insoluble "wash" and that it may be irrelevant anyway, because popular views on gun control are driven almost entirely by something else—variously called "cultural values" or social norms.[429] In the view of Braman and Kahan, both sides purport to agree that public safety is the key issue. One side believes that safety is better served by reduced access to guns, while the other side freer access to guns. The debate then is about the nature and degree of risk, and Braman and Kahan rely on recent studies in risk evaluation to conclude that these differential risk assessments can be traced to attitudes and values quite independent of any rational assessment of actual risk.[430] Ironically, given the concern of the *Secret Ambition* essay about the "imperialist" ambitions of certain "expressive" norms and values, this extension of that essay into the specific area of gun control illustrates norms commentary itself in its strangely imperialist avarice of over other disciplines, indeed virtually deploying empirical social science in the service of proving the irrelevance of empirical social science.

The Braman-Kahan paper purports to be both descriptive and prescriptive. The premise of its prescription is stated as follows:

> Instead of continuing to focus on the consequences of various types of regulation, academics and others who want to help resolve the gun controversy should dedicate themselves to identifying with as much precision as possible the cultural visions that animate this dispute and to formulate appropriate strategies for enabling those visions to be expressively reconciled in law.[431]

We are not told how this reconciliation might occur, nor, indeed, why it would even be desirable.

In any event, the paper proceeds to suggest that a phenomenon variously described as "cultural values" or "social norms" best explains individual notions about the efficacy or desirability of gun control. Braman and Kahan note that risk perceptions are influenced or skewed by both moral attitudes and cognitive filters that can be

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[429] DONALD BRAMAN & DAN M. KAHAN, MORE STATISTICS, LESS PERSUASION: A CULTURAL THEORY OF GUN-RISK PERCEPTIONS 3-4 (Yale Law Sch. Public Law & Legal Theory Working Paper Series, No. 05, SSRN-286205).

[430] *Id.* at 5-12; *see generally* MARY DOUGLAS & AARON WILDAVSKY, RISK AND CULTURE (1982) (elaborating relationships among risk evaluation, social norms and political conflict).

[431] Braman & Kahan, *supra* note 429, at 4.

traced to these values.[432] They then sort out these cultural values along two dimensions or axes: hierarchical vs. egalitarian views of society; and individualist vs. solidarist views. They then proceed to an empirical study, drawing on the categories of social attitude about masculinity and honor described in the *Secret Ambition* paper.

The survey questions cover such hot-button attitude issues as the death penalty; laws on interracial marriage; homosexuality; gender roles in domestic work; guns vs. butter questions about the economy; and the relative importance of spending public money on the environment, crime, drugs, foreign aid, welfare, etc.,[433] but is not at all clear how these questions define anything we can coherently call cultural values. They are sound-bite questions about public issues much discussed in the media, and they are invitations to people to project desirable images of themselves through a kind of social posturing. This posturing could be related to something called culture, or norms of behavior, if we had more information about, or better definitions of, those things. But the survey itself is about willingness to express fairly simplistic or binary attitudes on superficially framed issues.

The result of the regression analysis, Braman and Kahan conclude, is striking. At the start of the paper they see the landscape of political division about guns: "pitting women against men, blacks against whites, suburban against rural, Northeast against South and West, Protestants against Catholics and Jews, the gun question reinforces the most volatile sources of factionalization in our political life."[434] But now the dominant explanation of views on guns is the clustering of the attitude answers along the hierarchical/egalitarian and individualist/solidarist axes. And, they conclude, this explanation trumps all others (except gender), including race, religion, ethnicity and even party affiliation.[435]

The authors make much of this last point to stress that these "cultural values" are more important than "political ideology,"

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[432] *Id.* at 6.

[433] If one wants to quibble with the methodology, one can wonder why the authors include all these variables as single variables, but do not look at any interactive effects (e.g., the effect on gun control attitudes for individuals who are both, say female+urban, or female+catholic+black).

[434] *Id.* at 1.

[435] "Nevertheless, the precise difference in values that might explain why women are concerned with some risks and men with others seems to evade the hierarchy-egalitarianism and individualism-solidarism framework central to exiting work on the cultural theory of risk." *Id.* at 22-23.

though they do not explain what they mean by ideology in a way that connects it to stated party affiliation. But more significant for them is the supposedly dramatic advantage that the cultural values factor has over race, ethnicity, and religion. If this factor is designed to identify something called culture distinct from these other factors, then it is an unexplained and odd form of culture. There is something suspiciously illogical about cultural values that do not significantly correlate with the mundane categories of social grouping, such as race, ethnicity, and region. If they are separate, what indeed is culture and where in the world does it come from?

The authors also plausibly observe that cultural factors dominate any factual basis or fear of a particular risk—such as perceived crime rates, prior victimization or actual local crime rates. According to Braman and Kahan, these values also dominate the so-called availability heuristic, because, as they note, the Columbine school massacre did not measurably alter public opinion about gun control.[436] What Braman and Kahan fail to note, however, is that the availability heuristic could still obtain in the absence of any change in public opinion, because both sides of the debate could have been reinforced by the incident. That is, the massacre was wholly susceptible to competing interpretations—either that guns needed to be removed from the reach of school youth, or that more guns should be present in public buildings to thwart killers. In any event, Braman and Kahan insist that norms construct "worldviews," "cultural orientations," and "psychological profiles," and thereby render views of the efficacy of gun control irrelevant to the debate.

So Braman and Kahan ultimately pose the question of what will resolve the gun debate. But the weak answer is something like an Athenian rhetorical theater of cleansed value expression. "In order to civilize the gun debate, then, *moderate* citizens—the ones who are repulsed by cultural imperialism of all varieties—must come out from behind the cover of consequentialism and talk through their competing visions of the good life without embarrassment."[437] They note that there are examples

> of communities successfully negotiating culture-infused controversies—ones between archaeologists and Native Americans over the disposition of tribal artifacts; between secular French educators and Muslim parents over the donning of religious attire by Muslim school children; between the supporters and opponents of abortion rights in France and Germany. Rather than hide behind culture-effacing modes of discourse,

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[436] *Id.* at 25.

[437] *Id.* at 34 (emphasis in original).

> the individuals involved in these disputes fashioned policies that were expressively rich enough to enable all parties to find their cultural visions affirmed by the law.[438]

At times they speak of "social meanings" as if they are exogenous and unchangeable and not worth arguing about, and they refer approvingly to what Kahan had earlier described as the liberal ban on moralizing discourse. Yet they also vaguely hint that these social meanings are changeable through suasion, just as in earlier pieces Kahan had suggested that social meanings are manipulable through surgical legal interventions.

Ultimately, the Braman-Kahan thesis seems to be that scholarship on gun control is misguided and wasteful because the debate on gun control does not ultimately turn on empirical studies showing the costs and benefits of gun control; rather cultural attitudes are more helpful in explaining how people view the issue. Braman and Kahan thereby "straw-man" the empirical scholarship on gun control; but their skeptical dismissal of empirical studies of guns is unconvincing. This type of empirical work is important because it at least encourages people on both sides of the debate to talk (more) honestly about the consequences of having or not having gun control. The empirical work, to be sure, remains divided and divisive, because of (a) political bias, because some studies are rigged to reach a certain result; and (b) incompetence on the part of some empiricists. Nevertheless, this indeterminacy does not mean that empirical work should be discarded, but that it should be held to a higher standard.

But Braman and Kahan also "straw-man" the entire gun control debate. They express disdain for the empirical scholars for (as they attribute to them) believing that empirical studies should resolve the debate but they even seem to disdain the very relevance of policy analysis itself. They suggest that the debate can be better discussed and possibly *resolved* by looking at cultural issues. But the gun control debate may be inherently unresolvable, and, in any event, resolution is not necessarily desirable or necessary for the public good. Some people believe in the right to have guns, irrespective of the consequences, whether for constitutional, safety, or other cultural reasons. No amount of empirical evidence showing the social cost of gun ownership will change their mind. Some people hold the opposite view, and no amount of empirical evidence showing the social benefits of gun ownership will change their minds. So, in a sense, the empirical work does not resolve the debate. But neither

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[438] *Id.* at 34-5.

will a discussion on cultural issues at the level of generality which Braman and Kahan suggest.

V. A RETURN TO HUMANIST INTERPRETATION?

I have suggested through this essay that the norms school has implicitly and occasionally explicitly drawn on the capital of interpretive and humanist approaches to law to support its claim that "social norms" and "social meaning" make a distinct contribution to understanding social behavior and law. Nevertheless, the overall thrust of the norms writing has been to offer itself as a corrective to instrumental or social science understandings and predictions, a corrective, like behavioral economics, that purports to refine and not step outside of the boundaries of social science. Yet it is hard for the norms school to resist returning to humanist principles and interpretive methods to advance its claim of distinctness. In that regard, a recent foray by Dan Kahan into humanist interpretation of social behavior offers a useful look at the capacity of the norms school to simultaneously absorb and respect humanistic interpretation or cultural study.

William Ian Miller's *An Anatomy of Disgust* is a rare example in recent scholarship of a study of subjective emotion and moralizing from an interpretivist perspective. It is one of a series of books by Miller comprising an unusual cultural project with interesting implications for enriching our understanding of law, but with no claim of or desire for any specific application to law.[439] I hardly purport to summarize this complex book in the brief space here, but a quick review of its goals and thesis, and a quick sampling of the literary flavor of this strange book, can help set up the point to follow—the way it has been construed in relation to social norms. Miller says that his "central mission in this book is to demonstrate that emotions, particularly ones like disgust and contempt, make possible social orderings of particular stripes, and that it behooves social and political theory to care about these emotions and how they structure various social, moral, and political orderings."[440] Miller's key thesis is that "matter matters and that only polemical foolishness

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[439] *See, e.g.*, WILLIAM IAN MILLER, HUMILIATION (1993); THE MYSTERY OF COURAGE (2000).

[440] WILLIAM IAN MILLER, THE ANATOMY OF DISGUST 18 (1997) [hereinafter MILLER, ANATOMY].

will allow us to ignore the fact that some of our emotions generate culture as well as being generated by it."[441]

The book quite deliberately wallows in what Miller calls "life soup" of sensations and emotions.[442] Miller experiments with understanding the relationship between our more refined and abstract aspirations and "the grotesque body, unrelenting physical ugliness, nauseating sights and odors . . . suppuration, defecation, or rot" of our daily lives.[443] Miller maintains that this visceral disgust is a major element in our humanity—not only in personal life, but also in civic and social life generally. And, necessarily, the experiment requires him to draw on a variety of sources and disciplines, including psychology, literature, and history. He considers how disgust enriches our understanding of misogyny and homophobia, and of class distinctions of various sorts. Indeed, the concept of disgust helps us understand any form of prejudice or social classification or distinction that can draw on misanthropy and might derive from some sort of deflected or projected self-hatred for our natural condition.

Miller describes how cultures often call on disgust to back their moral ordering and then how they must work hard to override the entailments. Disgust exists in a tense dialectical relationship with notions of the pure.

> Disgust signals our being appalled, signals the fact that we are paying more than lip-service; its presence lets us know we are truly in the grip of the norm whose violation we are witnessing or imagining. . . . The avowal of disgust expects concurrence. It carries within it the notion of its own indisputability, and part of this indisputability depends upon the fact that disgust is processed so particularly via offense to the senses. . . . When you say you love or that you feel regret I am never quite sure of your inner state in the way I am when you say you are disgusted.[444]

Disgust, for Miller, has other powerful communalizing capacities and is especially useful and necessary as a builder or moral and social community. It performs this function by helping define and locate the boundaries separating our group from their group, from pollution, the violable from the inviolable.

Central to Miller's unique project here is to posit distinct emotional conditions as having distinct characters and personalities and cultural missions. So disgust actually has a very complex and sophisticated cognitive content. Disgust is "*about* something and in

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[441] *Id.* at xiii.
[442] *Id.* at 18.
[443] *Id.* at 5.
[444] *Id.* at 194.

response to something . . . [it] necessarily involves particular thoughts, characteristically very intrusive and unriddable thoughts, about the repugnance of that which is its object."[445] These thoughts revolve around the notion of a particular type of danger for the self, "the danger inherent in pollution and contamination, the danger of defilement."[446] Disgust evaluates its object both as base and as a threat. Thus, it is closely linked both to fear (for the self) and to contempt (for the object).[447]

To refine our understanding of disgust, Miller offers a carefully calibrated taxonomy of emotional conditions so he can distinguish disgust from other conditions. He is hardly offering this taxonomy as a scientific classification of emotions, even in the sense of descriptive sociology. Rather, he is engaged in a unique kind of cultural experiment, though one with Renaissance and Neoclassical precedents such as Montaigne or Sir Richard Burton.[448] Contempt, for example, is more clearly social and less physical than disgust; it is a way of expressing moral and social value upward and downward on the social scale. Contempt is the emotional complex that articulates and maintains hierarchy, status, rank, and respectability, and indeed differentiated status and rank are eliciting conditions of contempt. So what we have is a kind of feedback loop in which contempt helps create and sustain the structures which generate the capacity for contempt, and there is good reason to believe that the particular style of contempt will be intimately connected with the precise social and political arrangements in which it takes place. Thus, says Miller, "[k]ings and lords inoculated themselves somewhat against the risk of punctured pomposity by privileging fools and lower-class jesters who were allowed to ridicule their superiors to their faces."[449] Contempt is a pleasant emotion—mixed with pride and self-congratulation. Contempt, moreover, often involves decorous, decent treatment of the inferior and thus can be gentle and even loving.[450]

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[445] *Id.* at 8.

[446] *Id.*

[447] *Id.*

[448] *Id.* at xii.

[449] *Id.* at 223.

[450] *Id.* at 33. Miller quotes Chesterfield's warning against "insolent contempt" by which we posture by using contempt to establish status. Says Miller, "[s]o close is the connection between status and contempt that one frequently sees people inept at reading all the subtle properties of contempt's regulation, promiscuously spraying contempt about in the belief that the mere display of it will secure their rank." *Id.* at 217.

Contempt also can be sardonic; it smacks of indifference and complacency, and, in turn, it must be distinguished from shame and hatred. Hate is less instantly visceral—it builds, it "bespeaks a history. Hate wishes harm and misfortune on the object of hatred but is very ambivalent about wishing the hated one gone."[451] "We expect people to quarrel, to fight, even to kill those they hate under some claim of their own right to do so" as compared to the "miasmic gloom" of disgust.[452] And then, says Miller, there is indignation: indignation tends to be more precise in its manner, focusing on particular wrongs by particular agents, whereas disgust is a more generalizing moral sentiment casting blame on whole styles of behavior and personality traits. Indignation also may be inadequate to address truly horrible things. It can operate in the "light of day."[453]

But disgust, like contempt, has political significance. It can respond to and help create status. Disgust "presents a nervous claim of right to be free of the dangers imposed by the proximity of the inferior. It is thus an assertion of a claim to superiority that at the same time recognizes the vulnerability of that superiority to the defiling powers of the low."[454] It differs from other emotions by this aversive style. But Miller concludes:

> Even in the informally regulated domain conceded to us by law and politics to sort out for ourselves we find serious restrictions imposed on the sanctions we can visit upon those who are the objects of disgust. Thus open mockery and even less malign forms of shunning are marked as unjustifiable or even illegal. We are left only with the private experience of our disgust and the suspect pleasure of a contempt which colors our sense of self-congratulation for being so much better behaved than the deformity-mocking gods of Olympus.[455]

A. KAHAN ON MILLER

Kahan finds *The Anatomy of Disgust* irresistible material for incorporating into his criminal jurisprudence. In a long review-essay, Kahan laments that Miller did not apply his treatment of disgust to criminal law, and he now offers to fill the gap.[456] To carry out this elaboration of Miller, Kahan contrasts two judicial decisions

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[451] *Id.* at 35.

[452] *Id.* at 36.

[453] *Id.* at 35.

[454] *Id.* at 9.

[455] *Id.* at 203.

[456] Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621 (1998) (reviewing MILLER, ANATOMY, *supra* note 440) [hereinafter Kahan, *Disgust*].

exemplifying what he might call "sentencing disgust." One is *Commonwealth v. Carr*,[457] a murder case which rejected a mitigation argument by the defendant that he was tempted to kill by the sight of two men in sexual activity and therefore was supposedly only guilty of heat-of-passion manslaughter; the other is *State v. Bednarski*,[458] where, conversely, a judge reduced the defendant's sentence because he sympathized with the killer's disgust at homosexual conduct. Kahan makes much of these cases chiefly as a means of elaborating the theme of his *Secret Ambition* article about the death struggle between expressivism and deterrence. And he is equally unsuccessful here.

By contrasting *Carr* and *Bednarski*, Kahan suggests that the criminal law is put to an extreme binary choice between types of disgust, but the examples hardly prove his point. The criminal law category of voluntary manslaughter law has always walked a fuzzy line between viewing "adequate provocation" as a matter of causal mechanics or moral evaluation, and because of or despite this, the homophobic killer does not present much of a challenge.[459] At least as Kahan describes the *Bednarski* case, there is no doctrinal basis for any formal mitigation, and the trial judge's disgust-based decision to do so is an uninteresting, if revolting, outlier. To understand the doctrinal basis for this decision, we would have to probe beyond voluntary manslaughter to diminished capacity doctrine, a doctrine now largely overruled.[460] In the end, we would confirm that the judge in *Carr* could legitimately excuse all psychiatric evidence; he would be mundanely free to express disapproval of Carr's prejudice, and there would be no great moral significance to the case at all.

In setting his foundation for his reading and assimilation of Miller, Kahan asserts that the dominant themes of criminal jurisprudence are what he calls consequentialism and voluntarism, and he laments that these themes are insufficient to accommodate the rich range of our emotional lives, because they only allow for

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[457] 580 A.2d 1362 (Pa. Super. Ct. 1990).

[458] Dallas Times Herald, Dec. 15, 1988 (Dallas County D.C. Nov. 28, 1988). *See* Lisa Belkin, *Texas Judge Eases Sentence for Killer of Two Homosexuals*, N.Y. TIMES, Dec. 17, 1988, at A8; *Judge is Censured Over Remark on Homosexuals*, N.Y. TIMES, Nov. 29, 1989, at A28.

[459] For a rich recent discussion of the many interpretations of the doctrine, see Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959 (2002).

[460] *Id.* at 984-89.

expression of fear and anger, respectively.[461] But Kahan's definitions of these concepts are insufficient to explain this assertion, especially on the side of voluntarism. Voluntarism for Kahan seems to mean calibrating criminal punishment according to the individual's capacity to conform her behavior to the law and, thus, presumably can include expression of anger at a person for failure to conform if that person has capacity. But the voluntarist perspective nevertheless leaves open the question of the definition of the norm being violated or the harm being caused, and it is not clear why the harm to be avoided cannot include matters associated with strong emotional revulsion. In any event, as Kahan confirms later in this essay, he is reprising his earlier argument that "liberal discourse" suppresses moralizing and, in this case, expressions of moral revulsion, and he rightly notes that Miller is in accord with this.

The problem lies with the way Kahan then takes a Procrustean turn in flattening Miller's nuances into a formula. Kahan infers from Miller what he calls four "theses," though this thesis structure makes no appearance in Miller. The "evaluative thesis" holds that disgust is not just a visceral physical instinct but also a form of moral disapproval. Next, the "hierarchy thesis" simply holds that disgust draws status boundaries. Next, what he calls the "conservation thesis" holds that disgust is some sort of zero sum of moral energy in the world and, if suppressed somewhere, will arise elsewhere. Finally, there is the "moral ambivalence thesis," by which Kahan means something vague about how disgust can accord with both good and bad moral values and thus requires reference to some independent moral norm.[462]

When Kahan then turns to voluntary manslaughter, he views the *Carr* and *Bednarski* cases as being all about using disgust to express moral indignation either in favor of or against homophobia. He says that neither voluntarism nor consequentialism takes any overt stand on the moral quality of the offender's values.

> Clearly offenders who kill (or assault) on the basis of "homosexual panic" are disgusted by their victims. Under the evaluative thesis, what would be distinctive about their aversion wouldn't be its psychological intensity – a mechanistic notion – but rather its embodiment of the offenders' appraisal of gays and lesbians as inferior and contaminating. Under the hierarchy thesis, the offenders' animus would be constructed by and reinforce status norms, which the offenders understand to be threatened by homosexuality. By the same token, we would have to understand courts

[461] Kahan, *Disgust*, *supra* note 456, at 1631.

[462] *Id.* at 1632-33.

> to be evaluating the offenders' disgust sensibilities and constructing norms of hierarchy by deciding how severely to punish them. Decisions that withhold mitigation would be doing this every bit as much as ones that grant it. Indeed, consistent with the conservation thesis, we should expect to see the forces who are committed to raising the status of gays and lesbians engaged in their own effort to seize hold of the law's machinery for expressing disgust and redirecting it against homophobes.[463]

But Kahan fails to acknowledge the rich history of voluntary manslaughter law, which has always been a shifting and complicated blend of psychological and socially-grounded moral factors.[464] He also ignores the modern cases, especially in the area of domestic violence, that have prompted a huge debate about the relationship between the apparent moral relativism of modern formulations of the doctrine and the need to constrain the mitigation doctrine by reference to consequentialist and moral themes in feminism.[465]

Kahan treats homicide doctrine, though, as largely mechanistic. Indeed, he argues that without the tool of disgust to address moral issues, it would be logical to expect these cases to turn entirely on scientific evaluation of whether the syndrome of homophobia causes loss of full volition. But this view of homicide law drains voluntary manslaughter doctrine of all its traditional, if contested, moral content. He brings in the apparatus of his four theses to explain, for example, that the killers were expressing disgust in order to assert hierarchy over people they thought inferior. Notably, the killer in *Carr* was convicted of first-degree murder, presumably for premeditating the killing, so to characterize him as in the throes of moral revulsion may be at odds with the case. Kahan concludes from this that the first-degree judgment serves to confirm that the court would allow no claim of right in a homophobic killing,[466] but the premeditation formula has historically been surely as much a mechanistic as a moral one.[467] Carr, in other words, may have been motivated by a coldly sociological discriminatory attitude based on a low evaluation of homosexuals, but it is not clear that any passionate

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[463] *Id.* at 1635.

[464] *E.g.*, Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 Yale L.J. 1331, 1332-38 (1997) (modern voluntary manslaughter doctrine tends to reinforce social judgments that cause heightened, as much as accommodate, heightened emotions).

[465] *See generally* Dressler, *supra* note 459.

[466] Kahan, *Disgust*, *supra* note 456, at 1637.

[467] *See, e.g.*, Austin v. United States, 382 F.2d 129 (D.C. Cir. 1967) (reviewing traditional doctrine requiring measurable duration of premeditation and specific mental processes).

disgust played any role in his motivation. Similarly, Kahan makes much of the fact that what aroused anger at the judge's mitigating remarks in *Bednarski* was that he spoke in terms of his own disgust at homosexuals.[468] But the quoted disdainful remarks could easily indicate a range of other negative emotions, such as contempt or hate, which Miller has taken pains to distinguish from disgust, or possibly not much emotion at all.

Kahan's prescription is to return to his critique of liberal discourse and to urge the "outing" of disgust as a way of honestly confronting it on the theory that it suppression makes bad disgust win over good disgust. This prescription, of course, is consistent with the expressiveness he (inconsistently) urges on gun control and other matters. Kahan then construes Miller to be admonishing that we ignore disgust at our peril—because it puts "[our] moral world at odds with itself" and violates many professed beliefs of fairness and justice. Kahan says that Miller usefully describes

> the sensibility of revulsion that individuals experience when confronted by others—whether sexual deviants or sadistic criminals—whose values seem shockingly alien and dangerous. The desire to separate them from the rest of—literally or symbolically—motivates individuals to lash out against them in violence, and communities to punish them in appropriately severe and expressive ways.[469]

Then again comes a near self-refutation from Kahan: "I have no stake in demonstrating that the salient features of this species of 'disgust' are in fact essential to all the diverse sensibilities conventionally assigned that label."[470]

Despite this disclaimer, Kahan goes on to assert that courts must acknowledge that they are constructing normative hierarchies, and that withholding mitigation does so every bit as much as granting it. Indeed, he says, consistent with the "conservation thesis," we should expect to see the forces who are committed to raising the status of gays and lesbians engaged in their own effort to seize hold of the law's machinery for expressing disgust and redirecting it against homophobes. But this is a tautology. Kahan offers the discovery that homophobes have a moral hierarchy that condemns homosexuals. And in a nonsequitur, he says Miller's conception of disgust "helps to explain a peculiar doctrinal disconnect in the homosexual panic cases."[471]

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[468] Kahan, *Disgust*, *supra* note 456, at 1622, 1655.

[469] *Id.* at 1631.

[470] *Id.* at 1632.

[471] *Id.* at 1637.

Thus, in the cases of *Carr* and *Bednarski*, if we take Kahan's mechanistic view of homicide doctrine, we may be forced to accept an excuse; if we take an evaluative approach, we may consciously or inadvertently be engaged in justification. If the latter, we must be prepared to back up our disgust responses with solid moral justification. Disgust is an expression, and expressive punishments convey condemnation that offender does not respect the true value of things. Kahan suggests that the court could have admitted Carr's psychiatric disgust evidence as provocation and then asks which of the two judges got it right. Yet he leaves us wondering how an abstract analysis of the phenomenon of disgust can tell us anything about this. Kahan argues that had the judge in the *Bednarski* case cloaked his decision in voluntarism or consequentialism, not disgust, the expressive consent of the opinion would not have been so salient.[472] But is it not equally plausible that the mere announcement of a light sentence would have been read by the public in the very same expressive way? Or even an opinion justifying the low sentence in some sort of consequentialist form?

Kahan also observes that in its indifference to mechanistic notions of voluntarism, disgust seems willing to condemn people for things they may not choose. In his mechanical view of the way criminal law comprehends behavior, he suggests that this kind of strict liability indicates a radically non-voluntarist view of the criminal mind. Of course, if that is true, he might be expected to rethink his entire notion of shaming penalties, but Kahan never fleshes out the significance of this supposed willingness to tolerate a kind of strict liability, and he thereby reveals the real problem in his reading of Miller. Miller interprets disgust as expressing condemnation without any necessary regard for the condemned person's volition, because of the subtle way that disgust captures a larger social vision of social hierarchy and worth. Kahan might thus have been motivated by Miller to elaborate on the meaning of the strong negative emotions he sees as important and potentially useful in criminal law. He might have seen how concepts like disgust have interpretive value in helping understand pragmatic tools to execute those judgments.

Kahan unequivocally cites hate crimes as confirming the disgust—expression thesis—as if de-linking them entirely from civil rights laws and anti-discrimination laws more generally.[473]

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[472] *Id.* at 1636.

[473] *Id.* at 1634-38.

Distinguishing hate crime laws from his (oddly mechanistic) view of voluntary manslaughter doctrine, Kahan says that in the case of hate crime laws we express counter-disgust at those who express disgust at gays (though he then makes the half-hearted concession that this may have nothing to do with disgust at all). In interpreting hate crime laws, Kahan cites newspaper articles and columns that explicitly use the word "disgust" to condemn acts of criminally violent prejudice, and he thereby concludes that disgust is precisely the emotion that motivates hate crime laws.[474] But the game is given away when he approves hate crime laws on the ground that they condemn the moral position exhibited by the hateful act—the wrongdoer's failure to respect "the true value of things."[475] Respect for true value is a vague and amorphous concept that can include a range of systems of value or animating moral emotions associated with retributivism, and it bears no necessary relation to disgust.

Similarly, Kahan throws in a plug for shaming penalties as supported by Miller's notion of disgust, even though Miller takes great pains to distinguish shame from disgust to give them distinct characters. Moreover, Kahan never reconciles the link between disgust and shame in this essay with his numerous arguments in other papers that shaming penalties, if properly administered, should promote, in Braithwaite's terms, reintegration,[476] and hence are inconsistent with the bad hierarchical attitudes he often conflates with disgust.

Finally, Kahan appropriates his disgust-competition concept for the death penalty and uses it half to explain and half to partly justify the unresolved debate over how modern statutes and procedures can constrain without eliminating discretion. Indeed, he says, rather Panglossianly,

> the response of that doctrinal regime is to conserve the insights of *all* our moral sentiments rather than privileging only a subset of them. Consistent with the moral ambivalence thesis, the law remains faithful to both the certainty of our disgust sensibilities and the second-order doubts we have about whether that certainty is warranted.[477]

Kahan concludes with the bizarrely idiosyncratic case of *Commonwealth v. Beldotti*,[478] where a sadistic sex killer requested

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[474] *Id.* at 1638.

[475] *Id.* at 1641.

[476] *See generally* JOHN BRAITHWAITE, *supra* note 366.

[477] Kahan, *Disgust*, *supra* note 456, at 1647.

[478] 669 N.E.2d 222 (Mass. App. Ct. 1992)

that after his trial his "property"—various instruments of sexual torture–be returned to him under state law. The court denied the request, and Kahan finds this decision highly salient in American law, because, as he interprets it, the court had no basis for its refusal other than a sense of disgust. Kahan seizes on this case because, in contrast to the homicide cases where he seems to realize his disgust scheme provides very weak explanations, *Beldotti* is a virtual controlled experiment for testing the salience of disgust. The case is thus a challenge to those who might advocate a disgust-free criminal law—the indefinable group he calls "opponents of disgust in criminal law."[479]

But where is the danger he has warned of? Kahan says that granting Beldotti's request would have allowed him "to continue degrading [the victim's] death"—indeed, would have made the state complicit in his depravity. This is supposedly a challenge to liberalism, since Kahan fears, liberalism would resist any normative judgment here. We should not eschew expressions of disgust in criminal law, but rather we should "oppos[e] unjust forms of disgust *with* just ones."[480] Kahan concludes: "[i]f our confidence in the intuition that *Beldotti* was correctly decided outstrips our access to the empirics that would substantiate the deterrent benefits of forfeiture of his property, then something else besides deterrence explains the intuition."[481] But of course one can imagine quite a range of principles or sentiments which justify denying the request here; inventing the binary distinction between the instrumental goals of minor forfeiture law and the specific phenomenon of disgust hardly seems justified by this case. Indeed, Kahan himself would surely, if pressed, have agreed that "liberalism" would find some non-disgust-based norm here. Liberalism, Kahan at one point concedes, does promote what he calls "hierarchies," but his occasional gesture in imputing some normative commitment to what he calls liberalism aims at easy targets:

> Even egalitarians hold pedophiles and sadists in low esteem, for example, not just because such persons threaten physical harm, but because their values reveal them to be despicable. . . . On this account, the proper course for liberalism is not to obliterate disgust, but to reform its objects so that we come to value what is *genuinely* high, to despite what is *genuinely* low.[482]

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[479] Kahan, *Disgust*, *supra* note 456, at 1649-52.

[480] *Id.* at 1657.

[481] *Id.* at 1651.

[482] *Id.* at 1652-53.

But what is the normative or descriptive content of Kahan's reference to the term "despicable" here? What independent measure does he have? Does Kahan assume that we experience a visceral disgust at the thought of pedophiles, and thus must deploy it in the criminal law to fight off possible liking of pedophilia? Indeed, he admits to the contradictory and indeed incoherent nature of his notion of "liberalism" when he acknowledges Miller's view that "[t]here is, sadly, no reliable moral theory that stands outside our disgust sensibilities and that we can treat as normative for them."[483] We can only try to test and temper disgust with respect to other emotions.

Thus, this one foray by Kahan into the Humanities shows how the norms approach risks a Procrustean misreading of the distinct value of Humanities and law scholarship—which is to induce deeper critical understanding of law's operations, and perhaps to indirectly effect reform, but hardly so mechanically.

This problem is illustrated by two important general misreadings of Miller by Kahan. First, he insists on calling Miller a "social constructivist."[484] The whole point of Miller's book is that disgust is an innate human characteristic which finds social objects where it needs them and creates culture. The loose term "social constructivist" suggests quite the opposite, and though Kahan says he recognizes that Miller sees instinct and meaning as mutually causal, his insistence on constructivism misses the originality of Miller's approach, in fact, of Miller's refusal to see the emotion of disgust as a "social construct." Equally important, Kahan criticizes Miller for speaking too universalistically about disgust and for lumping too many things together under the umbrella of disgust.[485] Kahan thereby shows his failure to appreciate Miller's unique interpretive method. Miller is identifying a type of reaction that is coherent *even* if it has many manifestations or occasions. His project only make sense if one grants his intellectual premise, that is, if one allows him to posit a distinct personality and cognitive scheme for each of the emotions he portrays. If his concept of disgust seems too "universal," that is precisely because Miller is not a social constructivist in the sense Kahan means, and, in any event, as noted above, Miller goes to huge lengths to distinguish disgust from other aversions, as Kahan notes but does not fully respect.

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[483] *Id.* at 1633 (citing MILLER, ANATOMY, *supra* note 440, at 197).

[484] *Id.* at 1625.

[485] *Id.* at 1630-31.

Finally, in justifying the application of Miller's notions of disgust to practical questions of law, Kahan expresses concern that because of its flaws, Miller's "theory" may be "false," but Kahan offers the comfort that that even an "admittedly false" theory can be pragmatic.[486] But it is impossible to tell what Kahan means here, because there is no meaningful sense in which an interpretive inquiry like Miller's experimental ruminations on disgust can be "false." Social science may recognize that flawed or false causal theories can meet the suppler tests of pragmatism, but that has little to do with the Humanities. And if the law-and-norms school feels it must pay fealty to the proof demands of the social sciences, it cannot at the same time so glibly appropriate the contribution of the Humanities.

VI. CONCLUSION

In considering the relationship between interpretive concerns with cultural meaning and social scientific understandings of instrumental cause in the study of criminal law, we can turn, paradoxically, to a sociologist for an especially telling example of the former. In Jack Katz's remarkable study, *Seductions of Crime*,[487] the "text" is the inner and outer behavior of the criminal, as recorded in Katz's interviews and observations, and as captured, and misrecognized and reconstructed, by legal categories. Katz reviews a wide variety of criminal artists-in-the-self-making: the killer who engages in "righteous slaughter" who kills out of moral justification even where no law recognizes the defense;[488] the petty shoplifter who acts out a sensual fantasy of "sneaky thrills."[489] But perhaps the key social identity discovered by Katz to underlie and somewhat escape our formal legal definitions is the type of the "badass." In portraying this character, Katz uses interpretive methods and imagination to deepen our understanding of criminal motivation by giving us a sense of what actions and symbols "mean" to criminals. But Katz knows that his utility to the study of criminology and law cannot be one of direct instrumental application, so much as a deeper and more complex perspective.[490] A collective version of the badass's

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[486] *Id.* at 1631.

[487] JACK KATZ, SEDUCTIONS OF CRIME: MORAL AND SENSUAL ATTRACTIONS IN DOING EVIL (1988).

[488] *Id.* at 12-51

[489] *Id.* at 52-79.

[490] For Katz, "meaning" is vital. The badass's guiding purpose is not so much to threaten particular violence but rather to show that he "means" it, and so he must distinguish himself

individual composition of identity is the phenomenon of the "street elite," which expresses itself through the rituals of street fighting. Street elites also exhibit their indifference to, indeed their transcendence of, the utilitarian calculus, engaging in provocative cursing, the semiotics of violence, and the retrospective attestation of the profundity of attackers' offended dignity. As Katz shows violence enables gangs to transform their principles of association from symptoms of childhood to standards of glory; they make a metaphor of sovereignty respected by peers and feared by society; they sustain their claim of elite status in an aura of dread.[491] A related example is that of the type of robber he calls the "Hardman." In his chapter "Doing Stick-Up,"[492] Katz shows how even the most professional robbers create elaborate symbols that make an aesthetic project out of demonstrating their calculating utilitarian commitment, while at the same time their lives are pitifully self-destructively irrational.[493]

What, if any, policy implications might flow from Katz's reading of crimes as Nietzschean aesthetic projects? Perhaps little more than the caveat that the causal chain linking incentives to crimes is incalculably more twisted than conventional criminology imagines. A cultural reading of crime might provoke us to rethink the criminal law's libertarian emphasis on the actor's wrongful intentions at the moment of acting, and to focus blame instead on the character and persona from which the wrongful act seems to flow unreflectively. Thus we may want to broaden our inquiry into the actor's responsibility for the character he has become, for the aesthetic project he is embarked upon. But if a cultural analysis of criminal violence may sometimes expand responsibility by broadening the temporal inquiry, it may undermine the utilitarian case for punishment. If violence is an aesthetic project of defining one's self by contrast to officially enforced norms of civility, it will not easily

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from imitators who do not "mean" it. Moreover, the specifics of his "meaning" must be elusive, in order to reinforce his awesome, ominous presence. The badass alone controls the boundary between rationality and irrationality, and lets the world know that he is not beholden to make this meaning intelligible to others by clarifying the distinction. *Id.* at 80, 110-12.

[491] *Id.* at 114-63.

[492] *Id.*

[493] As Katz shows, for the "Hardman" the aesthetic aspect of the act is apparent in the tendency of robbers to formally characterize their actions by announcing, "This is a robbery!" He achieves a subjective moral advantage through this declaration of aesthetic control. *Id.* at 164-69.

be commodified and reduced to the logic of price. An effective crime policy may not be a law enforcement strategy at all, but a cultural strategy. On the other hand, the perverse inventiveness of the criminal countercultures Katz uncovers should discourage any confidence that the state can dictate the identities its stratagems engender.

Compare Katz's work with that of criminologist Mercer Sullivan, who would in no way deny that social science can identify certain invariances in criminal conduct, such as age-crime curves, and who can absorb the meaning-making aesthetic goals of Katz's criminals. Sullivan echoes Katz in suggesting that crime by the urban poor is "driven not by self-perpetuating deviant values but by survival strategies that have their own logic, at least in the unavoidable short term, as adaptations to their environments."[494] But he chastises the strand of "community studies" that fail to connect these factors to the deep effects of labor market on crime, and hence what might be called a criminal culture of money.[495] He argues that community studies must consider how social patterns within a neighborhood are in act organized in response to larger outside networks and indeed to national and international economic and social systems.[496]

The subtlety of Sullivan's work illustrates why the concept of a social norm may, in its claim to substance or precision, hinder more than help the study of crime. Sullivan accepts the standard refutations of simple crime-unemployment correlations, but sees the relationship of labor opportunity and crime as complex. In a youth's life, crime may precede even the possibility of work, and occasional crime can overlap with early employment; indeed manual shop training can provide some criminal skills. But overall, the influence of employment is long-term and involves "character-building"—it does not constrain crime in the short run. The key is not the employment of the individual, but the density of consistent employment in the neighborhood. This material factor, more than the temptingly more complex-looking factor called collective efficacy or the various names the norms- writers attribute to it, is the one most

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[494] Mercer L. Sullivan, *Neighborhood Social Organization: A Forgotten Object of Ethnographic Study?*, *in* ETHNOGRAPHY AND HUMAN DEVELOPMENT: CONTEXT AND MEANING IN SOCIAL INQUIRY 208 (Richard Jessor, et. al., eds. 1996).

[495] MERCER L. SULLIVAN, "GETTING PAID": YOUTH CRIME AND WORK IN THE INNER CITY 226-50 (1989) [hereinafter SULLIVAN, "GETTING PAID"].

[496] Sullivan, *Neighborhood Social Organization*, *supra* note 494, at 210.

worthy of analysis. But it is not a singular material factor, because it includes, for example, the efficacy of local job networks, which distinguish blue collar neighborhoods where education rates are not necessarily high. And of course distant macroeconomic forces probably affect crime rates,[497] factors like the outsourcing of manufacturing to the Third World, and conversely, the immigration of Third World laborers to American cities. Other factors that can only clumsily be captured by the vocabulary of norms are more local, including various local attitudes that include tolerance, exhaustion or resistance in the face of criminal victimization, along with acceptance of a certain amount of wealth redistribution from crime. But whatever these material forces, criminals tend to be as in Katz, fairly creative entrepreneurs responding to social situations.[498] Nevertheless, Sullivan avoids a potentially reductionist term like "culture" and is even wary of the old culture-as-poverty theories of the 1960's. The ghettoes he studies are ruled by many non-market relations of reciprocity and redistribution and exchanges of goods and services among kin cut off from conventional markets. Criminals work in groups that share trends, attitudes, cliquish fads; to some extent they are entrepreneurial teams as in the case of car theft/chop shops, and to some extent they blend into a larger noncriminal "community" that has ambivalent attitudes about crime and its perverse benefits. These factors are complex enough to merit the casual use of the term "culture," but more putatively precise notions of "social norms" cannot capture the dynamic interrelations of these forces, and treating them as able to do so probably thwarts serious criminology.

In this regard, Sullivan's work reflects David Garland's call for sociology to supply a complex of perspectives to illuminate how crime affects the wider culture.[499] And it reminds us that Durkheim, and especially Garland's reading of Durkheim, can supply a deep admonition to simplistic theories of norms as justifying punishment. Garland celebrates Durkheim for his understanding of punishment as a means of expressing communal values and of solidifying social bonds of how punishment operates in a way that transcends the technical and managerial.[500] But he also notes that Durkheim had a

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[497] SULLIVAN, "GETTING PAID," *supra* note 495, at 226-28.

[498] *Id.* at 231-50.

[499] DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY (1990).

[500] EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (1893).

certain sense of punishment's tragic futility, that social solidarity is often a very particular kind of solidarity—"the emotional solidarity of aggression," a form of tribal group hostility.[501] So Garland, to summarize a complex reading, warns against the Durkheimian mistake of viewing the rules and ceremonies of belief and punishment as being "coterminous with 'society' or [as] . . . necessarily promot[ing] social harmony."[502] Durkheim and Garland bring us to a level of understanding about the expressive and normative effects of punishment that the current norms scholarship can hardly conceive, and implicitly offer warnings about its misuse that law-and-norms scholarship hardly heeds.

[501] Garland, *supra* note 499, at 76-77.

[502] *Id.* at 80.